[redacted]

[redacted]

No. 28.

[redacted]

SARAH A. HIBBEN, PLAINTIFF IN ERROR,

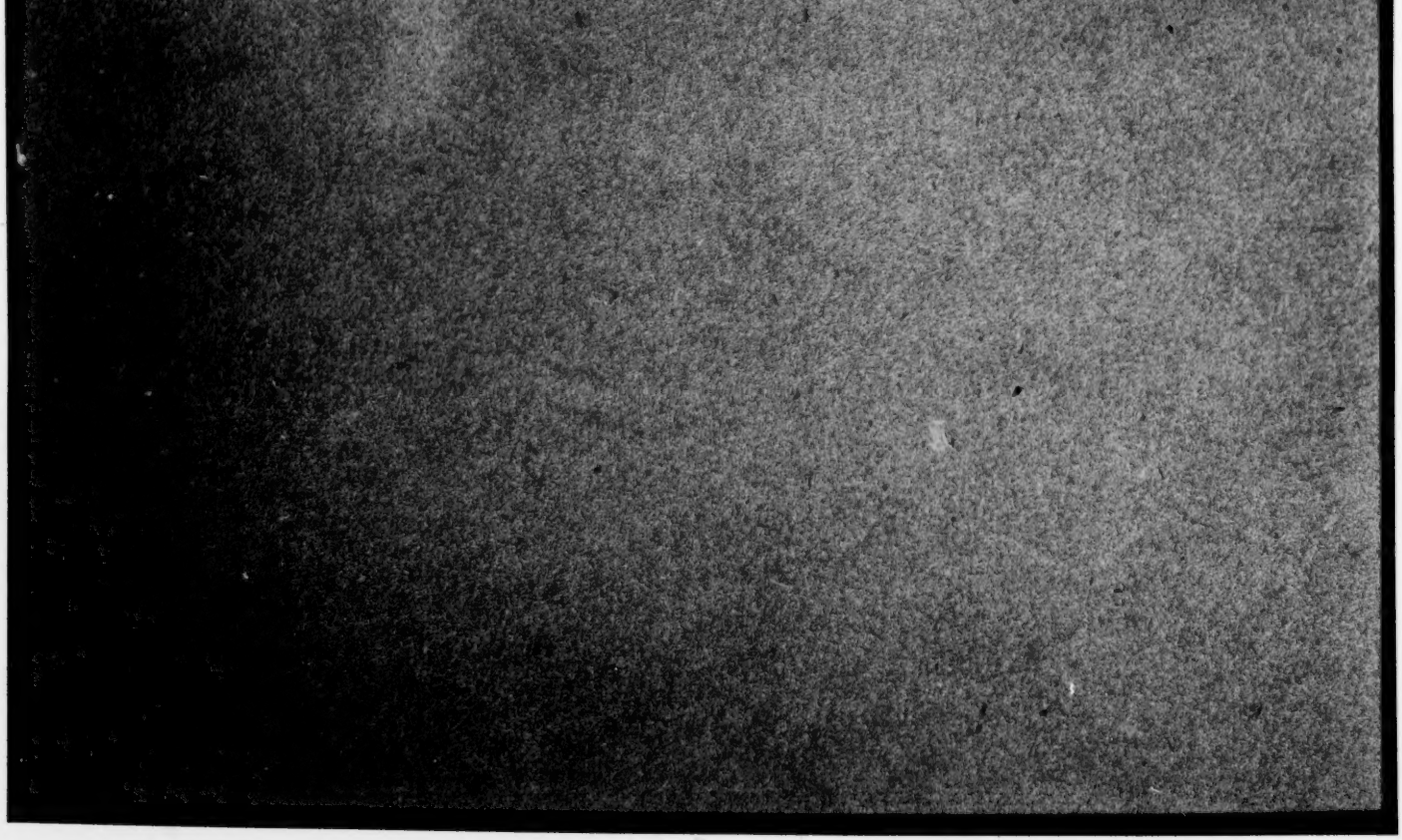
vs.

WILLIAM C. SMITH, JOSEPH H. PATTISON, AND [redacted] P. CHURCHMAN, PARTNERS TRADING AS THE [redacted] CIAL EXCHANGE, THE FINANCIAL EXCHANGE [redacted] JOSEPH H. PATTISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [redacted]

FILED MAY 21, 1903.

(16,548.)



(18,548.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN, PLAINTIFF IN ERROR,

vs.

WILLIAM C. SMITH, JOSEPH H. PATTISON, AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE, AND JOSEPH H. PATTISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from superior court of Marion county	1	1
Caption	1	1
Complaint	1	1
Exhibit A—Estimate roll	6	4
Order assigning cause for trial	7	5
Demurrer to complaint	7	5
Order overruling demurrer	7	5
Order filing answer	8	5
Answer of Sarah A. Hibben	8	6
Rule to reply to answer	51	31
Order filing additional answer	51	31
Fifth paragraph of answer of Sarah A. Hibben	51	31
Rule to reply to answer	52	32
Order filing demurrer to answer	52	32
Order on demurrer to answer	53	33
Order filing cross-complaint of Sarah A. Hibben	53	33
Cross-complaint of Sarah A. Hibben	53	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 7, 1903.

	Original.	Print
Order filing demurrer to cross-complaint	88	54
Demurrer to cross-complaint	88	54
Order sustaining demurrer to cross-complaint	88	55
Order filing demurrer of certain defendants to cross-complaint	89	55
Demurrer of Financial Exchange *et al.* to cross-complaint	89	55
Disclaimer of Indiana Bermudez Asphalt Co.	89	56
Order sustaining demurrer of Financial Exchange *et al.*	89½	56
Decree	90	57
Order allowing appeal	94	59
Appeal bond	94	59
Præcipe for transcript on appeal	96	60
Clerk's certificate	96	61
Assignment of errors	97	61
Order submitting cause	99	62
Order filing brief of appellant	99	62
Order filing petition for oral argument	99	62
Order filing petition for extension of time to file brief	99	62
Order granting petition for additional time	99	62
Order filing brief of appellees	100	62
Order filing reply brief of appellant	100	62
Order filing petition to fix day for argument	100	63
Order setting cause for argument	100	63
Order filing opinion	100	63
Opinion	101	63
Judgment	103	66
Order filing petition for rehearing	104	66
Order overruling petition for rehearing	104	66
Order filing petition for writ of error	105	66
Petition for writ of error	105½	67
Allowance of writ of error	107	68
Order filing writ of error	109	68
Writ of error	110	69
Order filing bond	111	69
Bond on writ of error	112	69
Order filing citation	114	70
Citation and service	115	71
Order filing assignment of errors	117	71
Assignment of errors	118	72
Clerk's certificate	123	74

a STATE OF INDIANA:

In the Supreme Court.

Be it remembered that heretofore, to-wit: on the 28th day of January, 1901, the same being the 55th judicial day of the November term, 1900, Sarah A. Hibben, by her attorneys, filed in the office of the clerk of the supreme court of the State of Indiana, a transcript of the record and proceedings in the Marion superior court, of said State, in a cause wherein William C. Smith was plaintiff and Sarah A. Hibben, *et al.*, were defendants, together with an assignment of error indorsed thereon, which transcript and assignment of error, together with an appeal bond, were filed in this court in term, and are in the words and figures following, to-wit:

1 Be it remembered, that among the records of proceedings had, papers filed, motion decided, rulings made, exceptions noted, judgements rendered, decrees entered, etc., in the superior court of the county of Marion, State of Indiana, are the following in the cause of

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, Joseph H. Pattison, Elwood W. Seamans, Indiana Burmuda Asphalt Company. } Number 58774.

And be it also remembered, that heretofore, to-wit: on the first day of June, 1899, the above named plaintiff, by Harvey, Pickens, Cox & Kahn, his attorneys, filed in the office of the clerk of said Marion superior court a complaint against the said defendants, in the words and figures following, that is to say:

Complaint.

STATE OF INDIANA, *Marion County,* } *ss:*

Superior Court, Room —.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, JOSEPH H. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company. } No.—.

2 The above named plaintiff complaining of defendants above and hereinafter named says, that the town of Irvington is a town corporation, duly established under and by virtue of the laws of Indiana. That on to-wit:—the 23rd day of February 1898 the board of trustees of said town of Irvington declared, by proper resolution duly and unanimously adopted, that it was then necessary to improve the roadway of Washington street in said town between

Central avenue and Wallace street in said town. That said resolution declared the kind, size and location of such needed improvement and designated the terminal point thereof.

That thereafter due and lawful notice for ten days of the passage of said resolution was given for two weeks in the Indianapolis Sentinel a newspaper of general circulation, printed and published in Marion county, Indiana, in which county said town is and was located and published in said town.

Said notice stating the time and place when and where the property holders along the line of said proposed improvement could make objection thereto.

That said board of trustees also caused notice by publication according to law, to be given for three successive weeks that said board would on a day therein receive proposals for contract for making such improvement.

That after a hearing of the property owners and after receiving bids according to the respective notices therefor said board confirmed said resolution of necessity and ordered that said roadway be improved with brick according to said resolution, and said board awarded said contract on April 4, 1898 to John Moore, he being the lowest and best bidder, and thereafter on the 30th day of April, 1898,

3 said Moore entered into a contract with said board of trustees for the construction of said improvements in accordance with said resolution and specifications, and gave bond therefor to the approval of said board and entered upon the execution of said work.

That thereafter on July 22, 1898 by and with the consent and ratification of said trustees said Moore assigned his said contract to this plaintiff who thereupon accepted the terms of said contract and executed to the approval of said trustees a bond according to law and entered upon the execution of said contract and continued so to do until said improvement was completed and accepted by said trustees.

That said trustees caused the cost of said improvement to be assessed in all things according to law against the property and lots abutting and bordering on said part of said street so improved and benefitted thereby.

That at the time said improvement was so ordered the defendant next herein named, owned the property next herein described and bordering on said improvement in the number of feet named and assessed for the amount named, to-wit:—

Sarah A. Hibben:

Lot	53	Pattison's	University	place	40	ft.....	$141.60
"	54	"	"	"	40	"	141.60
"	55	"	"	"	40	"	141.60
"	56	"	"	"	40	"	141.60
"	57	"	"	"	40	"	141.60
"	58	"	"	"	40	"	141.60
"	59	"	"	"	40	"	141.60
"	60	"	"	"	92 50/100	"	327.45

All that part of west half of southwest quarter of section 3, township 15 north, range 4 east, fronting south on Washington street 1157 02/100 feet measuring east from a point — feet east of the west line of said quarter section, and extending north 150 feet the entire length of said 1157 02/100

1157 02/100 ft..... $4095.85

That final estimate of the total cost of said improvement was made and reported by the town engineer as by law required.

That said trustees gave two weeks' notice in a newspaper
4 printed and published in said Marion county, there being no such paper printed and published in such town, naming a time and place when and where a hearing would be accorded to the owners of property bordering on said improvement before a committee appointed by said board to consider such report.

That such hearing was so accorded to and had by the defendant and all other such property owners.

That said committee thereafter made report to said board of trustees recommending the adoption of said report.

That said board of trustees thereafter accorded such of said owners of property as felt aggrieved by such report on the 26th day of April, 1899, a further hearing and thereupon and thereafter on the 26th day of April 1899 said board accepted said improvement as completed in all things in accordance with the contract and specification therefor and approved said estimate and assessed against the property hereinbefore named the amount so named for and on account of said improvement.

That a copy of so much of said final estimate and assessment roll as related to the property of the defendant herein is filed herewith as part hereof, marked "Exhibit A."

That said assessment is now due with 6 per cent. interest and remains unpaid although proper and lawful notice has been given said defendant naming a place where the same could be paid and the amount and interest and all charges.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and Indiana Bermudez Asphalt Co. claim some interest in the subject matter of this action and are made parties hereto that they may answer to such interest.

5 That plaintiff has been compelled to employ attorneys to prosecute this action and that a reasonable amount for the service of such attorneys in prosecuting this foreclosure is the sum of $500.00.

Wherefore, plaintiff prays that said lien *is* foreclosed against said property for the amount including interest and attorney's fees thereon, and for sale of said property for the satisfaction thereof and for all proper relief in the premises.

HARVEY, PICKENS, COX & KAHN,
Pl'ff's Attorneys.

EXHIBIT A.

Sheet 1. South side. Sheet 2 S. side.
46–50 51–53.

IRVINGTON, INDIANA, *Jan.* 28, 1899.

To the town board of Irvington, Indiana:

I herewith report an estimate roll for grading and paving with brick Washington St. from Central Ave. to Wallace St. Authorized by special improvement resolution No. 189 based upon the terms of the contract of W. C. Smith, contractor for said work; approved by the town board the — day of —— 189–.

Total length frontage of improvement 5126 15/100 feet.
Total cost of improvement $18,146 57/100.
Average cost per lineal front foot 3 54/100.

Property frontage.
Total allowance to property owners
Total cost of work done by contractor.

No.	Owners' names.	No. of feet.	Description.	No. of lot.	Addition or subdivision.	Assessment for work done by contractor.
						Dollars. Cents.
46	Sarah A. Hibben.....	40	Copy Exhibit....	53	Pattison's University	141.60
47	" "	40	"A"	54	place	141.60
48	" "	40	.....	55	.....	141.60
49	" "	40	.....	56	.....	141.60
50	" "	40	.....	57	.....	141.60
51	" "	40	.....	58	.....	141.60
52	" "	40	.....	59	.....	141.60
53	" "	92.50	.....	60	.....	327.45
36	" "	1157.02	Pt. W. ½ of S. W. ¼ sec. 3–15–4..	.....	.....	4095.85
						5414.50

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

7 And afterwards, to wit: on the first day of June, 1899, the same being the 23rd judicial day of the May term, 1899, of said superior court, before the Hon. John L. McMaster, James M. Leathers and Vinson Carter, judges in general term thereof, the following proceeding was had herein: "Ordered, that cause, number 58774, be assigned to room three (3) for trial."

And afterwards, to wit: on the 22nd day of September, 1899, being the 17th judicial day of the special term of said superior court, before the Hon. Vinson Carter, judge presiding in said room three (3) the following proceeding was had herein, viz:

"Now comes the defendant Sarah A. Hibben by counsel and files her demurrer to the complaint in this cause, in the words and figures following:"

Demurrer to Complaint.

STATE OF INDIANA, } ss:
Marion County, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } Cause No. 58774.

Comes now the defendant, Sarah A. Hibben, and for her separate demurrer to plaintiff's complaint filed herein, says:—

First. That the same does not state facts sufficient to constitute a cause of action.

M. W. HOPKINS,
Att'y for Defendant Sarah A. Hibben.

Demurrer to Complaint Overruled.

And afterwards, to wit: on the 19th day of October, 1899, being the 16th judicial day of the October term 1899 of said court, before the same hon. judge, the following proceedings were had

8 herein: "Come the parties by counsel, and the court, being fully advised in the premises, over-rules the demurrer of the defendant, Sarah A. Hibben, to the complaint herein, to which ruling said defendant at the time excepts and she is ruled to answer over."

And afterwards to wit: on the 7th day of February, 1900 being the third judicial day of the February term, 1900, of said court before the same hon. judge, the following proceedings were had herein, viz:

Comes the defendant, Sarah A. Hibben, by counsel, and files her answer in four paragraphs to the complaint herein, as follows, viz:

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL Exchange, Joseph A. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company. } Cause No. 58774. Answer of Sarah A. Hibben.

1" Par. of Answer of Hibben.

First paragraph. The defendant, Sarah A. Hibben, for her separate first paragraph of answer to plaintiff's complaint, denies each and every material allegation therein contained.

2" Par.

Second paragraph. The defendant, Sarah A. Hibben, for her separate and second paragraph of answer to plaintiff's complaint says: That the street improvement set out in plaintiff's complaint was made and the lien therefor sought to be enforced in said complaint was attempted to be created by the board of trustees of the
9 town of Irvington under the authority of and in accordance with the provisions of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payment of the costs of street and alley improvements and building sewers and permitting cities or incorporated towns to issue street and sewer improvement bonds and repealing all conflicting laws and declaring an emergency." Approved March 8, 1889, being chapter CXVIII of the Laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, as amended by an act entitled "An act to amend sections four (4), seven (7) and ten (10) of 'An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing for the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payment of the cost of street and alley improvements and building sewers, and permitting cities and incorporated towns to issue street and sewer improvement bonds, and repealing all conflicting laws and declaring an emergency.' Approved March 8, 1889, and declaring an emergency." Approved March 6, 1891, being chapter CXVIII of

the Laws of the State of Indiana passed at the fifty-seventh regular session of the General Assembly; and also under the authority of and in accordance with the provisions of an act entitled "An act to extend the benefit of paying assessments for street, alley or sewer improvements in installments." Approved March 3, 1893, being chapter CXXIII of the Laws of the State of Indiana passed
10 at the fifty-eighth regular session of the General Assembly, all being sections 4288 to 4299, both inclusive, of the Revised Statute- of 1894.

That said acts and amendments thereto as aforesaid and each and every of the sections thereof, the same being sections 4288, 4289, 4290, 4291, 4292, 4293, 4294, 4295, 4296, 4297, 4298 and 4299, of said Revised Statutes of 1894 are all, and each section separately, opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States of America and that said sections and each of them are null, void and invalid and of no effect.

3" Par. Answer.

Third paragraph. The defendant, Sarah A. Hibben, for her separate and third paragraph of answer to plaintiff's complaint says:

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington, by resolution and ordinance declared the necessity for and provided for making street improvements in Washington street in said town from Central avenue to Wallace street, which resolution and ordinance was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring:

First. That a necessity exists for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue.

Second. That the said improvement shall be made and in the following manner, to-wit:—The said roadway shall be graded to a width of forty-two feet according to the following grade, to wit:—
11 Beginning at Wallace street at an elevation of 801 feet; thence east on a descending grade of 75/100 of a foot per one hundred feet to Pleasant run; thence on an ascending grade of 40/100 of a foot per one hundred feet for a distance of 700 feet; thence on an ascending grade of 2 60/100 feet per one hundred feet for a distance of 500 feet; thence on an ascending grade of 55/100 of a foot per one hundred feet for a distance of 1235 feet; thence on an ascending grade of 1 30/100 feet per one hundred feet for a distance of 600 feet; thence on an ascending grade of 1 15/100 feet per one hundred feet to the east line of Central avenue.

There shall be constructed upon the said grade as thus prepared, an improvement of one of the following kinds as may be determined by the board upon the opening of bids on each kind, viz:—

1st kind. Commencing eight feet on each side of the center of the

graded portion of said roadway, there shall be placed to the full width of the said graded portion, a macadam roadway consisting of three layers of broken limestone to a depth of fourteen inches in all and an additional layer of limestone screenings two inches thick, with a curb of stratified limestone, and along the sides of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

2nd kind. Commencing eight feet on each side of the center of the graded portion of said roadway a brick pavement shall be constructed of paving blocks laid upon a concrete base, with combined curb and gutter composed of cement, sand and crushed granite, and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

3rd kind. Commencing eight feet on each side of the cen-
12 ter of the graded portion of said roadway, an asphalt pave-
ment shall be constructed laid upon a concrete base, with combined curb and gutter composed of cement, sand and crushed granite, and along side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone.

All of the said work to be done to the satisfaction of the town engineer and the said board of trustees and in accordance with the plans and specifications therefor adopted by said board.

Third. The cost of the said improvement (except the proportion thereof occupied by street and alley crossings) shall be assessed per lineal foot against the real estate abutting thereon. The assessment if desired shall be paid in ten annual installments to each of which shall be added interest at six per cent. per annum payable semi-annually from the date of the final estimate and collected as provided by law. A bond or bonds shall be issued in anticipation of the collection of the said defined assessments unless the property owners pay their said assessments before said bonds are issued. All to be done in accordance with the provisions of an act of the General Assembly of Indiana concerning street improvements, approved March 8, 1889, and the acts amendatory thereof.

Fourth. The town clerk is hereby directed to give ten day's notice of the passage of this resolution for two weeks in the Indianapolis Sentinel, a daily newspaper of general circulation published in Indianapolis, Indiana, and in said notice it shall be stated that the property owners along the line of the said proposed improvement
may make objection to the necessity for either or all of the
13 several kinds of improvements herein specified at a meeting
of the said board of trustees to be held in their office in the said town on the 21st day of March, 1898, at 8 o'clock p. m.

Fifth. The town engineer is hereby directed to set the proper grade stakes and also to advertise by publication one day each week for three successive weeks in the Indianapolis Sentinel, a daily newspaper of general circulation published in Indianapolis, Indiana, that sealed proposals for the execution of each kind of improvement

herein provided for will be received by said board of trustees at their office in the said town on the 28th day of March, 1898, at 8 o'clock p. m.

Sixth. An emergency exists for the immediate taking effect of this resolution, therefore the same shall be in force from and after its passage."

That on the 24th day of February, 1898, and on the 3rd day of March, 1898, the said board caused to be published in the Indianapolis Sentinel, a newspaper of general circulation published in the city of Indianapolis, Marion county, Indiana, a notice of the passage of said resolution and giving notice to property owners that there would be a meeting of the board at 8 o'clock p. m. on the 21st day of March, 1898, at which time such property owners might make objection to the necessity for any or all of the three kinds of improvements mentioned in said resolution.

That on the 24th day of February and on the 3rd and 10th days of March, 1898, the town civil engineer of said town, by direction of said board, caused to be published in the Indianapolis Sentinel, a newspaper of general circulation published in the city of Indianapolis, Marion county, Indiana, a notice that on the 28th day of March, 1898, at 8 o'clock p. m. the said board would receive
14 proposals for making each of the three kinds of improvements mentioned in said ordinance; and said notice provided that the work should be done according to the said resolution of February 23, 1898 and according to the plans and specifications on file in the office of such town engineer.

That on the 7th day of March, 1898, the said board by ordinance approved the specifications for said improvement; that the specifications so approved were the general specifications of the city of Indianapolis for 1898, subject to necessary verbal changes, and that the specifications so approved were placed on file in the office of said town engineer and were the basis of the bids hereinafter mentioned, including the bid finally accepted by said board; that said specifications provided among other things, that upon notice from the town board the contractor should discontinue work during the winter months and place the work in condition to accom-odate the public and protect the work; that during the progress of the work and during a period of seven years from the date of the approval of the assessment roll, the whole work should be at the contractor's risk and he should be responsible for any and all damages to persons or property on account of the work, whether occasioned by rise in the river, floods, back water, caving, settling of trenches or foundations of buildings, or any portion of the improvement, derangement of alignment, defect in surface, foundations or other appurtenances, or otherwise occasioned; that without additional compensation the contractor should make good any such damage to the work and should make good any defect in the workmanship, materials or condition of the work during the said period of seven years; that said contractor should keep said work in repair during the

said period of seven years and should make all repairs
15 at such time as directed by the board or the engineer, and that such obligation on the part of the contractor should cover and include all repairs growing out of the imperfection or unsuitability of materials or compositions, too great or too little moisture, all defects of workmanship, extreme of heat or cold, and all other defects of climate, and covers all other excessive deteriorations, viz:—any holes or cracks in said pavement and any defects resulting from the decomposition of the wearing surface or foundation, and that the pavement at the expiration of the said period of seven years should be in good condition, and present surface so true and even that it should in no way be an obstruction to travel and have drainage so perfect that water should collect in no place to a depth of more than one-quarter of an inch; that the determination of the character, amount, extent and necessity for repairs should rest entirely with the board and its decision should be final and obligatory upon the contractor and that such determination might extend to the total reconstruction of the whole body of the work; that upon failure of the contractor to so repair or reconstruct, the said board might make such repairs or reconstruction at the expense of said contractor; that said board should retain out of the cost of said improvement a sum equal to 20 cents per square yard as a repair guarantee fund to secure the repair and maintenance of said pavement by the contractor in accordance with the contract for the construction, repair and maintenance thereof; that the contractoe should deposit with the said town a sum equal to 3 per cent. of the total cost of the said improvement as a coupon payment fund to meet the payments on delinquent bonds and coupons issued on this improvement; that in bidding the price should be stated per lineal front foot on each side, the amount to be ascertained by dividing
16 the total cost of the improvement including all appurtenances and maintenance for the said period of seven years by double the length of the street given in the specifications; that the contractor should not assign or transfer the contract or sublet the work, or any part thereof; that the contractor must have an office or agent in the city of Indianapolis during the period of construction and during said period of seven years; that all surplus earth removed by the contractor should be hauled to such streets, alleys or other places as might be directed by the said board and engineer within a distance of 1000 feet and shaped to the satisfaction of the said board and engineer; that the curbing should be under the same guarantee as the street surface; that the board would reserve the right to change the kind of brick to be used in said pavement even after the contract was let; that the estimated length of street to be improved was 5155 lineal feet; that the width to be graded was 42 feet; that the width to be improved was 26 feet; that the estimated amount of gravel concrete was 15,892 square yards; that the estimated amount of 4 inch brick surface was 15,892 square yards; that the estimated amount of curb and gutter was 9,600 feet; and 387 feet round corner curb; that the estimated amount of marginal stone was 10,485 feet; that there were five man holes and catch basins

and 14 iron inlets; and 10,310 feet drain tile; that the guarantee fund would be estimated upon the area of the pavement from face to face of curbing.

That on the 21st day of March, 1898, this defendant along with other property owners along the line of said proposed improvement filed with the said board of trustees their written objections to said proposed improvement; that the total frontage of property
17 owners along said proposed improvement was 9,266.65 feet; that said owners so objecting owned an aggregate frontage of 6,263.28 feet; that in said written objections the objectors asked that neither of the improvements provided for in said ordinance of February 23, 1898, be made for the reason that the probable expense would be largely out of proportion to the value of the abutting property, in several instances exceeding its value and working a forfeiture of the property, and that either would be of no more value to the property than a less expensive improvement.

That on the 28th day of March, 1898, said board received and opened bids for said improvements; that one John Moore bid for brick pavement $3.56 per front foot on each side; that one Daniel Foley bid for macadam improvement $2.45 per front foot on each side; that the Indiana Bermudez Asphalt Company bid for an asphalt pavement $4.43 per front foot on each side; that said bids were the lowest bids on each of the three kinds of improvement proposed; that said bids were referred to the committee on streets, alleys and contracts; that on the 4th day of April, 1898, said committee reported to said board recommending that the contract be awarded to said John Moore; that said report was adopted and on the said date the said board adopted a resolution providing for a brick roadway improvement in accordance with the resolution of February 23, 1898, and the plans and specifications before adopted, which resolution was in the words and figures following, to-wit:

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring, That whereas it has heretofore been declared by this board by a resolution passed on the 23rd day of Feb. 1898, that a necessity
18 existed for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue, and that the same should be graded as therein provided and that upon such grade there should be constructed one of three kinds of improvements therein set out as might be determined by this board upon the opening of bids on each of said kinds, now therefore it is hereby resolved by the said board that the said roadway shall be improved by constructing thereon the following improvement, viz: a brick pavement of paving blocks laid upon a concrete base, with combined curb and gutter composed of sand, cement and crushed granite and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone, the same being one of the kinds of improvement provided in the said resolution, which shall be constructed in accordance with the provisions of the said resolution

passed on the 23rd day of Feb. 1898 and the plans and specifications for such improvement heretofore adopted by this board, and resolved further that the bid of John Moore for the construction of the said improvement heretofore received by this board proposing to make the same for $3.56 per lineal foot on each side be and the same is hereby accepted, and the said John Moore shall enter into a formal contract for the performance of the said work and file his bond as provided in the specifications within 10 days and the judiciary committee is directed to prepare said contract.

Resolved further That all the checks received with bids upon the said improvement, except the check received with the bid of John Moore, be returned by the treasurer to the persons to whom they belong.

The resolution was unanimously adopted."

19 That on the 11th day of April, 1898, the said board by ordinance provided that the Indiana paving block manufactured at Brazil, Indiana, should be used in making said improvement.

That on the 11th day of April, 1898, the contract for said improvement was approved by said board; that on the 25th day of April, 1898, the said contract and the bond of the said Moore were ordered spread of record and the finance committee was authorized to accept the bond if in accordance with specifications; that on the 30th day of April, 1898, and in pursuance of the above mentioned proceedings, said board entered into and signed a contract with said John Moore and accepted his bond to construct the improvements hereinbefore mentioned and described, which contract and bond were in the words and figures following, to-wit:—

"This agreement, made and entered into this 18th day of April, 1898, by and between John Moore of the county of Marion and State of Indiana, party of the first part, and the Town of Irvington, State of Indiana, Marion county, party of the second part, under and by virtue of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and board of trustees and providing the mode and manner of making street and alley improvements and building sewers and providing for the mode and manner of enforcing the payments of the costs of street and alley improvements and building sewers and permitting cities or incorporated towns to issue street and sewer improvement bonds," approved March 8, 1898, and acts amendatory thereof.

Witnesseth: That the party of the first part covenants and

20 agrees to improve the roadway of Washington street in the town of Irvington, Indiana, from the west property line of Wallace street to the east property line of Central avenue, by grading the same to a width of 42 feet and by paving to a width of 11½ feet on each side of said roadway, with the best quality of standard brick block, manufactured by the Indiana Bermudez Asphalt and Paving Company at Brazil, Indiana. Said block to be as good in

all respects as the sample block submitted to the board of trustees on the day of letting their contract, which blocks are duly registered and are now in the office of said board; the block surface to be laid on a six inch gravel concrete foundation; by placing a marginal curb finish at all street and alley intersections, also along either side of said improvement next the street railroad company's right of way; by curbing and guttering with cement curb and gutter; paving with said block and curbing and guttering as aforesaid the wings of intersecting streets and alleys to the property lines on said Washington street and by filling intersections of block with Portland cement grant filling, all for the sum of three dollars and fifty-six cents ($3.56) per lineal foot on each side of said improvement complete, according to a resolution adopted by the board of trustees of said town on the 23rd day of February, 1898, and the plans, profiles and specifications are made a part hereof as fully and effectually as if copied herein at full length. * * *

The party of the first part further contracts and agrees that he will exercise in the prosecution of said work, all proper skill and care; that he will properly and fully guard and protect all excavations and dangerous places, and will use all due and proper precaution to prevent injury to any property, person or persons, what or whomsoever; that for and during the time of the making of
21 said improvement, and the period for which the same is to be maintained and kept in repair by him, he will save the town of Irvington harmless from any and all liability growing out of any injury or damage to property or persons because of any neglect or fault of himself or his agents or employees in the execution of this contract, or because of any neglect or fault of himself or his agents or employees in any matter connected therewith or related thereto, and to pay any judgement with costs, which may be obtained against the town on account of any such injury or damage.

It is mutually understood and agreed that the second party shall be liable to said first party for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing and for no more.

The said party of the second part contracts and agrees that if any of the property owners on said street elect to pay said assessments in ten equal annual installments or provided by said act, it will make and issue to said first party improvement bonds bearing interest at the rate of six per cent. per annum. covering such deferred payments.

Said work shall be commenced within thirty days from the execution of this contract and shall be completed according to its terms, on or before the 1st day of August, 1898, unless said time be extended in writing, by the board of trustees of said town. If the said party of the first part fails or neglects to commence said work on or before the time mentioned, said board of trustees may declare this

(re-let)
contract null and void, and may *re-elect* the same, and in the
22 event said first party or his sureties fail or neglect to prosecute said work with such vigor as, in the opinion of the board of trustees will complete the same within the time above fixed and fail to increase his force on notice from said board, then said board may declare this contract null and void and adjudge the same to have been abandoned and forfeited, and may re-let or require his sureties to complete the same, as said board shall elect; and said first party and his sureties shall be liable for all damages that may accrue by said failure to perform said work according to this contract, and shall be entitled to recover nothing from said town or the property owners along said improvement for work already performed or materials used, and such materials shall be retained by and belong to said town.

Said first party further contracts and agrees to pay any and all moneys due any contractor, person or persons, furnishing any material by contract for said work and to pay any and all laborers employed by said party of the first part for any work done in the prosecution of said improvement.

It is hereby expressly agreed that no assignment of this contract shall be made to any party without the consent of said board of trustees in writing, and any assignment without such consent first had shall nullify this contract.

It is further agreed that the said town shall not be liable to said first party or his assigns for any delay or loss in the payment of assessment or interest thereon by the property owners who fail or refuse to sign a waiver, availing themselves of the ten year installment plan of payment as provided by law, or for attorney's fees; and that, although suits for the collection of such assessments
23 may be brought in the name of said party of the second part, said town shall not be or be held liable for the cost or expense of such suits, or for any failure to recover the amount or amounts therein claimed to be due.

The party of the first part hereby consents that the said town shall retain out of the total amount shown by the final estimate to be due from the said town on account of street and alley crossings, a sum equal to twenty cents per square yard for each square yard of pavement constructed, which sum shall be and constitute a repair guarantee fund in the hands of said town for the purpose of securing the repair and maintenance of said pavement by the contractor to the satisfaction of the board. In the event the sum above specified shall exceed the amount due said contractor from said town on account of street and alley crossings, then said contractor shall deposit a sum sufficient to make said guarantee fund equal to twenty cents per square yard for each square of improvement constructed. This guarantee fund, or only such part of it as shall remain in the hands of the town unexpended as above provided at the expiration of said guarantee period, shall then be paid to the contractor with interest at the rate of five per cent. per annum.

Provided: that no interest shall be paid upon any part of said fund which the town may have been compelled to expend for repair at any time within said guarantee period of seven years.

Provided: also that no interest shall be paid until the ex-
24 piration of said guarantee period. Interest however may be paid annually on order of the board if the roadway is properly maintained by the party of the first part.

The contractor, party of the first part, hereby contracts and agrees to deposit with the town upon the certificate of the engineer showing the total cost of the improvement, a sum equal to three per cent. of said total cost, which sum shall be and constitute a fund in the control of the town's treasurer to be known as the coupon payment fund, which fund shall be used by said treasurer to meet the payment of all delinquent bonds and coupons issued by the town upon their improvement. The moneys taken from such fund for the purpose herein named shall be replaced and paid back into the fund as rapidly as such delinquencies are paid into the treasury. Said treasurer shall issue to the party of the first part a certificate of the amount retained, which shall not bear interest and shall be payable to the contractor or his order by the treasurer of said town two (2) years after the date of its issue.

It is hereby agreed that neither of said funds above specified shall at any time during the period for which they are retained be decreased by the said party of the first part.

In the event the pavement during the guarantee period is not in good condition and repair to the satisfaction of the board of trustees of said town, and if the first party shall refuse or neglect to put the same in repair to the satisfaction of said board on fifteen (15) days' notice, said board may cause the same to be done and pay for the same out of the guarantee fund above provided for, and said sum or sums so paid for such repairs out of said guarantee fund shall con-
stitute and be considered a payment by the said town upon
25 the amount due from it to the contractor on account of the cost of street and alley crossings, and the town shall retain the balance of said fund, if any, in said repair guarantee fund for use in future repairs. Should the cost of such repairs made by order of the board of trustees exceed the amount retained as above provided, or the amount of said repair fund remaining on hand at the time of making such repairs, the party of the first part shall be held responsible to the town for the amount of such excess, and such excess shall be collected by suit from the contractor.

The party of the first part agrees as soon as the assessment roll for their improvement is approved by the board of trustees and placed on the duplicate in the office of the town treasurer, to at once mail to each name on said assessment roll a notice, stating the amount of such assessment, when and where payable, and naming the last day upon which the owner may sign for the ten year plan. Such notice shall be properly stamped and addressed and put in the post office.

The right to construct any sewer or sewers, or to lay any water

or gas main or electric conduits or receiving basins and culverts, or to build up or adjust any man-hole, not otherwise provided for, or for supplying water or gas stop cocks in said street, and to grant permits for house connections with sewers, or with water or gas pipes or conduits, at any time prior to the completion of the improvement, is expressly reserved by the board of trustees, and the said board reserves the right to suspend the work on any part of said street, at any time during the construction of the same, for the purposes above stated; and said first party shall not interfere with or place any impediment in the way of any person or persons who may be en-
26 gaged in the construction of said sewer or sewers, or in laying said water or gas mains or conduits, or in making connections therewith, or doing other work above specified. In case, the contractor shall not be entitled to any damages, either for the digging up of the street or for the delay; but he shall be allowed and be paid for any additional work or material that may be necessary on his part, such reasonable sum (not to exceed the contract rate) as may be agreed upon between him and the said board, and the time for completing his contract shall be extended as many days as he was then delayed.

In the event any person, firm or corporation shall desire with the consent and approval of the board of trustees to enter into said pavement during the guarantee period of seven years, the contractor shall upon payment to him by said person, firm or corporation or by said town, of a sum sufficient to compensate said contractor for properly replacing said pavement, give his consent for the entering into said improvement, and such entering shall not vitiate or impair the guarantee given by the contractor upon said improvement or any part thereof. The contractor in such case, shall replace the pavement under the conditions named above, and the guarantee shall in no wise be impaired.

To each of the conditions and stipulations of this contract, the undersigned, John Moore, party of the first part, and Town of Irvington, party of the second part, each binds himself and itself and their successors and assigns.

In witness whereof, we, the foregoing named parties hereunto set our hands, this 18th day of April, 1898.

JOHN MOORE.
TOWN OF IRVINGTON.
HILTON U. BROWN,
President Board of Trustees.
C. B. CLARKE, *Clerk.*

27 ***Bond.***

Know all men by these presents that I, John Moore, as principal, and Joseph T. Gest, Daniel Lesley and Geo. H. McCaslin, of the county of Marion and State of Indiana, as sureties, are held and firmly bound to the Town of Irvington, Indiana, in the sum of

eighteen thousand, three hundred and fifty dollars ($18,350.) for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs, executors, administrators and assigns firmly by these presents.

The conditions of the above obligation are such that if the above named John Moore shall faithfully comply with the foregoing contract made and entered into this 18th day of April, 1898, with the Town of Irvington, Indiana, and shall fulfill all the conditions and stipulations therein contained, according to the true intent and meaning thereof, in all respects, then this obligation to be void, otherwise to be and remain in full force and virtue in law. In the event the said town shall extend the time for the completion of said work, such extension shall not in any way release the sureties on this bond.

This shall be a construction bond, and the sureties to the same shall not be held responsible for the maintenance and repair of the pavement after it has been accepted by the second party, but such sureties shall be held responsible for the faithful compliance with all the other conditions and restrictions set out in the contract.

Witness our hands and seals the day and year last above written.

JOHN MOORE. [SEAL.]
JOSEPH T. GEST. [SEAL.]
DANIEL LESLEY. [SEAL.]
GEO. H. McCASLIN. [SEAL.]"

28 That the said John Moore refused to proceed with the work of construction under said contract and on July 20th, 1898, so notified said town board to that effect; that thereupon said Moore entered into an agreement with William C. Smith, who for more than six months prior to such time had been the town civil engineer, to assign said contract to said Smith; that thereafter and on the 22nd day of July, 1898, the said William C. Smith offered to said board his resignation as said engineer, which resignation was accepted; that on the same day said John Moore assigned and transferred his said contract to the said William C. Smith; that on the same day the said board by resolution approved of and accepted said assignment, and released said John Moore from all liability on his said contract and bond, which resolution was in the words and figures following, to-wit:

"Whereas, the board of trustees of the town of Irvington passed a declaratory resolution for the improvement of Washington street on the 23rd day of February, advertising for the reception of bids on the 28th day of March, 1898, and

Whereas, at said date of receiving bids said board was restrained by the superior court on application of one Hay, a non-resident, supported by Harold Hibben, a non-resident. That thereupon said board received said bids and subsequently on April 13, 1898, said superior court held said resolution good, valid and legal and held in all things in favor of said board and thereupon said Hay prayed an appeal to the supreme court, said appeal being dismissed by said

court in due time. In the meantime the said Hibben, non-resident, filed before the Hon. Judge L. M. Harvey of the superior court, a like suit, in fact a duplicate of the Hay case, except as to name of plaintiff and

Whereas, this board awarded the contract to John Moore
29 for the improvement of said street with brick on his bid of *$3.56 per lineal foot on each side, and*

Whereas, said Moore entered into the execution of said contract and bond on the 18th day of April, 1898, and

Whereas, on the 20th day of July, 1898, said Moore served notice formally upon said board that he was unable to fulfill his contract and was ready and willing to assign the same to any one acceptable to said board, and

Whereas, said Moore, by written consent of said board, having assigned said contract and matters and things thereunder to William C. Smith, which said assignment is in the words and figures as follows:— to-wit:—

IRVINGTON, *July* 22, 1898.

For a good consideration, I, John Moore, hereby assign and transfer to William C. Smith all my right, title and interest, without recourse on me, in and to a certain contract to which this is attached, between myself and the Town of Irvington, Marion county, Indiana, to construct and build a brick roadway on Washington street in said town from Central avenue west to Wallace street.

This assignment of contract, before it shall be valid, shall by resolution duly entered of record and approved by the board of trustees of the Town of Irvington, and in, and by the terms thereof, the said board of trustees shall accept William S. Smith as the contractor to do said work on terms and conditions given in said contract, and further releasing John Moore from any and all responsibility on account of said contract and bond filed by him as such contractor with said board of trustees.

In witness whereof, I have hereunto set my hand this 22nd day of July, 1898.

JOHN MOORE.

30 STATE OF INDIANA, } ss:
Marion County, }

Personally appeared before me John Moore and signed and acknowledged the annexed and foregoing assignment of contract as his free act and deed for the uses and purposes therein stated.

Witness my hand and seal, this 22nd day of July, 1898.

JASON E. BAKER,
Notary Public, Marion Co., Ind.

Therefore be it resolved by the board of trustees of the town of Irvington, Indiana, that the said assignment is hereby accepted, ratified and approved and that William C. Smith is the recognized

contractor for the construction of said street under said contract and that the said Moore by virtue thereof is hereby released from all obligation thereunder, and his bond is hereby cancelled.

Further, be it resolved that the said William C. Smith be required to file with said board a bond in the sum of $18,350 within a reasonable time from the adoption of these resolutions and shall place on file an indemnifying bond that he will carry out the provisions of this resolution, and in all respects complete the work according to plans and specifications adopted by the board."

That thereupon said William C. Smith accepted said assignment; that on the 29th day of July, 1898, said Smith gave bond for the carrying out of said work according to the said contract with said Moore; and the board approved said bond; that on said 29th day of July said board extended the time for the completion of said improvement from August 1, 1898, to December 1, 1898; that afterwards during the construction of said improvement the said board employed said William C. Smith to do the work of a civil
31 engineer for said town of Irvington.

That on the 10th day of August, 1898, the said board employed John V. Coyner as town civil engineer for the balance of the year 1898; that on the 31st day of August, 1898, the said board provided that the contractor should change the specifications by leaving out the drain tile and allow a rebate of two cents per lineal front foot on each side; that on the 26th day of November, 1898, the said board extended the time for completion of said improvement from December 1, 1898 to January 1, 1899; that on the 28th day of December, 1898, the board extended the time for the completion of said improvement from January 1st, 1899 to February 1, 1899.

That on the 28th day of January, 1899, the town civil engineer submitted to the said town board the final estimate of the total cost of said improvement and at the same time made to said board a report upon said improvement, which report apportioned the entire cost of such improvement against all the abutting property on the basis of $3.54 per lineal foot on each side, which report was in the words and figures following, to-wit:—

"INDIANAPOLIS, INDIANA, *Jan'y* 26, 1899.

To the town board of Irvington.

GENTLEMEN: I beg to submit to you for your consideration, the assessment rolls for the improving of Washington street from Central avenue to Wallace street as per Mr. W. C. Smith's contract.

This is not to be considered as an acceptance of the work, as there are several things to be done by the contractor before the contract is completed. Some of these things can be done at this time of year and are being pushed as fast as the weather will permit, but others must lay over until spring and settled weather, when every-
32 thing can be completed and a final inspection made before the improvement is accepted.

I may mention here that item No. 60 on sheet 2 south side is not incorporated within the town.

I also submit the extra for paving done by the contractor, Mr. Smith. This extra was caused by the changing of the tracks from double to single at the curve of Washington Street and Central Avenue intersection. The contractor was compelled to change some of the marginal curb that had been placed in position as originally intended and the trenches were excavated for the remainder before I was notified of any change.

I consider the price, 25 cents per square foot a reasonable and just price for the same—not counting the delay and inconvenience caused by the above change of tracks.

The amount of extra surface paved—1024 8/10 square feet at 25 cents per square foot, equals $256 20/100—which I submit for your consideration.

Respectfully, JOHN V. COYNER.

April 26, 1899.

Estimate Roll, North Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report as estimate roll for grading and paving with brick, Washington street from Central avenue to Wallace street, based upon the terms of the contract of Wm. C. Smith, contractor for said work.

Total length frontage of improvement 5126 15/100 feet Average cost per lineal front foot $3.54.—Total cost of improvement—$18,146 57/100.

33	Owner's name.	No. of feet.	Description.	Assessment.
1	Town of Irvington	43	Central avenue	$169.92
2	Susan Davis	300	Lot 31, original Irvington	1062.00
3	Francis Barber	43	Lot 9, F. E. Barber's sub. of lot 32	152.22
4	Francis Barber	44	Lot 8, F. E. Barber's sub. of lot 32	155.76
5	Henry Moore	44	Lot 7, F. E. Barber's sub. of lot 32	155.76
6	Henry Moore	44	Lot 6, F. E. Barber's sub. of lot 32	155.76
7	Town of Irvington	50	Layman avenue	177.00
8	India L. and N. Brumfield	58 35-100	Lot 1, D. P. McLeod's sub. of lot 38	206.56
9	India L. and M. Brumfield	54 34-100	Lot 2, D. P. McLeod's sub. of lot 33	206.52
10	India L. and M. Brumfield	38 34-100	Lot 3, D. P. McLeod's sub. lot 33	206.52
11	Town of Irvington	15	Alley between Layman and Ritter	53.10
12	S. Kinley	40	Lot 4, Downey's sub. of lot 34	141.60
13	John W. Scott	40	Lot 3, Downey's sub. of lot 34	141.60
14	John W. Scott	40	Lot 2, Downey's sub. of lot 34	141.60
15	James Stevenson	41	Lot 1, Downey's sub. of lot 34	145.14
16	Town of Irvington	50	Ritter avenue	177.00
17	L. Ritter	90	Pt. of lot 8, Ritter's add	318.60
18	D. D. Pike	60	Pt. of lot 8, Ritter's add	212.40
19	S. M. Richereek	50	Lot 1, McLeod, Graham and Bitler's sub	177.00
20	S. M. Richereek	50	Lot 2, McLeod, Graham and Bitler's sub	177.00
21	S. M. Richereek	50	Lot 3, McLeod, Graham and Bitler's sub	177.00
22	M. Z. Pounds	50	Lot 4, McLeod, Graham and Bitler's sub	177.00
23	Town of Irvington	50	Hunter avenue	177.00
24	J. E. Pounds	50	Lot 5, McLeod, Graham and Bitler's sub	177.00
25	J. B. Pounds	50	Pt. lot 6, McLeod, Graham and Bitler's sub	177.00
26	Ellen E. Graham	6	Pt. lot 6, McLeod, Graham and Bitler's sub	21.24
27	Ellen E. Graham	56	Lot 7, McLeod, Graham and Bitler's sub	198.24
28	Town of Irvington	50	Elm avenue	177.00
29	Oliver P. Hay	156	Lot 5 L. and C. Ritter's sub. lots 23-24	552.24
34 30	Oliver P. Hay	120	Lot 6, L. and C. Ritter's sub. lots 23-24	424.80
31	Chas. E. Newlin	120	Lot 7, L. and C. Ritter's sub. lots 23-24	424.80
32	A. V. Dickman	120	Lot 8, L. and C. Ritter's sub. lots 23-24	424.80
33	Rachael Swain	155	Lot 25, Ritter's add	548.70
34	Town of Irvington	50	Blount avenue	177.00
35	Chas. W. Reid	127	Two acres in E. ½, W. ½, S. W. ¼, sec. 3-15-4	449.58
36	Sarah A. Hibben	1157 2-100	Part W. ½, S. W. ¼, sec. 3-15-4	4095 85
37	Town of Irvington	45	National avenue	159.30
38	H. U. Brown and A. H. Hannah	353 10-100	Part E. ½, S. E. ¼, sec. 4-15-4	1249.97
39	Edward A. Caylor	167 50-100	Part vacated street and lot 48	592.95
40	Chas. E. Bernhart	167 70-100	Lot 33, Blankenship *et al.* Pleasant View add.	593.66
41	Town of Irvington	60	Summit street	212.40
42	Edward A. Caylor	173 20-100	Lot 32, Blankenship *et al.* Pleasant View add.	613.13
43	John Moore	173 20-100	Lot 17, Blankenship *et al.* Pleasant View add.	613.13
44	Town of Irvington	60	Quincy street	212.40
45	L. L. Roach	167 70-100	Lot 16, Blankenship *et al.* Pleasant View add.	593.66
46	Wm. M. and E. Roach	167 70-100	Lot 1, Blankenship *et al.* Pleasant View add.	593.69
			Total	18146.57

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

Estimate Roll, South Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report on estimate roll for grading and paving with brick, Washington street from Central avenue to Wallace street, based upon the terms of the contract of W. C. Smith, contractor for said work.

Total length frontage of improvement 5126.15/100 feet.
35 Average cost per lineal front foot $3.54—Total cost of improvement—$18,146 57/100.

	Owner's name.	No. of feet.	Description.	Assessment.
1	Town of Irvington	48	Central avenue	169.92
2	C. L. and F. E. Shank	160	Lot 5, Shanks sub.	566.40
3	C. L. and F. E. Shank	60	Lot 4, Shanks sub.	212.40
4	C. L. and F. E. Shank	60	Lot 3 Shanks sub.	212.40
5	C. L. and F. E. Shank	60	Lot 2 Shanks sub.	212.40
6	C. L. and F. E. Shank	60	Lot 1, Shanks sub.	212.40
7	T. L. and M. V. Thompson	60	Lot 4 Thompson's sub.	212.40
8	J. C. and M. Barnhill	60	Lot 3 Thompson's sub.	212.40
9	T. L. and M. B. Thompson	60	Lot 2, Thompson's sub.	212.40
10	T. L. and M. B. Thompson	163 14-100	Lot 1, Thompson's sub.	577.52
11	Town of Irvington	57 78-100	Johnson avenue	204.54
12	L. L. Cross	79 33-100	Lot 35 original Irvington	280.83
13	Town of Irvington	50	Ritter avenue	177.00
14	Levi Ritter	210	Lot 1, L. & C. Ritter's sub. lot 32 Ritter's add.	743.40
15	Levi Ritter	100	Pt. lot — L. & C. Ritter's sub. lot 32 Ritter's add.	354.00
16	O. O. Carven	50	Pt. lot 3 L. & C. Ritter's sub. lot 32 Ritter's sub.	17.00
17	O. O. and C. T. Cerven	10	Pt. lor 4, L. & C. Ritter's sub. lot 32 Ritter's add.	35.40
18	W. S. and S. B. Moffett	90	Pt. lot 4, L. & C. Ritter's sub. lot 32 Ritter's add.	318.60
19	Jos. T. Gist	100	Pt. lot 32 Ritter's add	354.00
20	Town of Irvington	50	Cherry street	177.00
21	Henry Beerhans	75	Pt. lot 30, Ritter's add.	265.50
22	Sarah Shaffer	75	Pt. lot 30 Ritter's add.	265.50
23	Ellen E. Graham	60	Pt. lot 29, Ritter's add.	212.40
24	I. J. and R. J. Chase	60	Pt. lot 29, Ritter's add.	212.40
25	J. M. Stowell	70	Pt. lot 29, Ritter's add.	247.80
26	Town of Irvington	50	Downey avenue	177.00
27	Edward Kettenbach	58	Pt. lot 28 Ritter's add.	205.32
28	Edward Kettenbach	125	Pt lot 27 Ritter's add.	442.50
29	John T. Cusack	125	Lot 26 Ritter's add.	442.50
	30 Town of Irvington	6½	Alley between Downey and Commercial	21.24
36	31 R. W. and C. J. Long	42 91-100	Lot 1 Walker's Sunny Side sub.	151.90
	32 R. W. and C. L. Long	52 91-100	Lot 2 Walker's Sunny Side sub.	151.90
33	R. W. and C. L. Long	42 91-100	Lot 3 Walker's Sunny Side sub.	151.90
34	Town of Irvington	50	Commercial avenue	177.00
35	R. W. and C. J. Long	44 44-100	Lot 43, Walker's Sunny Side sub.	157.32
36	R. W. and C. J. Long	45	Lot 44, Walker's Sunny Side sub.	159.30
37	R. W. and C. J. Long	45	Lot 45, Walker's Sunny Side sub.	159.30
38	J. H. Van Deman	45	Lot 46, Walker's Sunny Side sub.	159.30
39	Citizens' Street R. R. Co.	45	Lot 47 Walker's Sunny Side sub.	159.30
40	Citizens' Street R. R. Co.	45	Lot 48 Walker's Sunny Side sub.	159.30
41	Town of Irvington	50	Lake avenue	177.00
42	James Stevenson	42 91-100	Lot 88, Walker's Sunny Side sub.	151.90
43	Jas. Milligan	42 91-100	Lot 89 Walker's Sunny Side sub.	151.90
44	M. S. McGaughey	42 91-100	Lot 90 Walker's Sunny Side sub.	151.90
45	Town of Irvington	12	Alley west of Lake Ave.	42.48
46	Sarah A. Hibben	40	Lot 53, Pattison's University Place add.	141.60
47	Sarah A. Hibben	40	Lot 54, Pat-ison's University Place add.	141.60
48	Sarah A. Hibben	40	Lot 55, Pattison's University Place add.	141.60
49	Sarah A. Hibben	40	Lot 56 Pattison's University Place add.	141.60
50	Sarah A. Hibben	40	Lot 57 Pattison's University Place add.	141.60
51	Sarah A. Hibben	40	Lot 58, Pattison's University Place add.	141.60
52	Sarah A. Hibben	40	Lot 59, Pattison's University Place add.	141.60
53	Sarah A. Hibben	92 50-100	Lot 60 Pattison's University Place add.	327.45
54	Town of Irvington	73 87-100	Coleman avenue	261.50
55	Sarah J. Pattison	1	Lot 16, Pattison's University Place add.	3.54
56	A. L. Parker	215 90-100	Pt. W. ½ of "¼ of S. W. ¼ sec. 3-15-4	764.29
57	Town of Irvington	60	National avenue	212.40
58	H. U. and J. H. Brown and M. E. Hannah.	666 85-100	Lots 46, 47, 48 and vacated street also part S. E. ¼ of S. E. ¼ sec. 4-15-4.	2360.65
59	A. P. Stanton, trustee	712 17-100	Part S. E. ¼ sec. 4-15-4	2521.08
60	A. P. Stanton, trustee	92 71-100	Part S. E. ¼ sec. 4-15-4	328.19
			Total	18146.57

37 I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

That said engineer's report was by the board referred to the committee on streets, alleys and contracts, and February 15th, 1899, was fixed as the date for a hearing upon such report.

That on the 31st day of January and on the 7th day of February, 1899, said board caused to be published in the Indianapolis Sentinel a notice that such hearing on such report would be had before the committee on streets, alleys and contracts, on the 15th day of February, 1899.

That on the 7th day of March, 1899, the said board granted an extension of time to enable the contractor to complete said improvements according to specifications and directed the committee on streets, alleys and contracts to procure from the city engineer of Indianapolis an opinion as to what was necessary to complete said improvement, and to employ said city engineer to oversee the completion of said improvement; that on the 25th day of March, 1899, the said committee on streets, alleys and contracts offered a report on such engineer's report, recommending that the board approve such engineer's report; that on the 26th day of April, 1899, B. J. L. Jeup, said engineer of the city of Indianapolis, made to said board a report upon said improvement, which report set out a number of things which should be completed by the contractor, and recommended that after their completion the assessment as made by said Coyner in such engineer's report be allowed; that on the said 26th day of April, 1899, the said board extended to property owners an opportunity to make objection to said improvement; that on the said 26th day of April, 1899, the said committee
38 on streets, alleys and contracts, offered a substitute report on such engineer's report; that said substitute report set out that a hearing had been had on such engineer's report on the 15th day of February, 1899, that said substitute report found that the measurements in such engineer's report and the amounts assessed therein were correct and recommended the passage of an estimate resolution approving and confirming the assessments as made by said town engineer in such engineer's report, which substitute report of the committee was in the words and figures following, to-wit:—

"Your committee on streets, alleys and contracts to whom was referred the estimate roll by the town civil engineer for the construction of a brick pavement in Washington street from Central avenue to Wallace street begs leave to report that a meeting of the committee was held on Feb 15, 1899, at 8 o'clock p. m. in the rooms of the town board pursuant to notice duly given to hear objections, if any, of the property owners affected by said estimate; that questions were raised by Thomas L. Thompson and Charles M. Cross as to the accuracy of the measurement of their respective frontages and that further hearing was accorded them and other citizens with the result that the committee finds from the data at command and supplied by the engineer, that the measurements in the estimate and the amounts assessed are correct. The committee having further satisfied itself that the additional work required by the engineer had been per-

formed by the contractor, now and hereby recommend the passage of the estimate resolution approving and confirming estimates as made by the engineer for the construction of the said pavement. Your committee also recommends that a contract be required of the contractor, W. C. Smith, to put in repair 100 feet of curbing on the north side of Washington street between Pleasant run and (National) Emerson avenue; and 160 feet on the south side of the street west of the Pleasant Run bridge and other portions of curb indicated in Engineer Jeup's report to the board and that $225.00 in cash in addition to guarantee fund, be required for the performance of said work.

Your committee also reports that Susan Davis contends that a private roadway should have been left into her grounds when the curb and roadway were constructed—the committee recommends that the said property owner be guaranteed a driveway at a cost not to exceed the cost of said driveway at the time said roadway was constructed, to-wit:—$24.85.

JESSE SUMMERS,
HILTON U. BROWN,
J. C. BARNHILL, *Com.*

That on such hearing before said committee on streets, alleys and contracts and on the hearing before said board of trustees, no hearing was had upon and no consideration was given, to the question of whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, established the rule of assessment at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to said engineer's report and the assessment therein based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

That said substitute report was adopted and that thereupon on the said 26th day of April, 1899, the said board by ordinance accepted said improvement and adopted and approv*ment* such engineer's report and approved and confirmed the assessment set forth in such engineer's report, which approval and confirmation was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana.

That the report of the committee on streets, alleys and contracts recommending the approval of the final estimate made by the town civil engineer in favor of William C. Smith, contractor for the improvement of roadway of Washington street from the west property line of Wallace street to the east curb line of Central avenue pursuant to resolution passed on the 23rd day of Feb'y 1898, be and the same is hereby approved.

That the assessments set forth in said final estimate are hereby approved and confirmed, and there *is* hereby assessed against the several lots and parcels of ground as described in said final estimate, the several amounts set opposite and assessed against said several lots and parcels of ground respectively, for and on account of said improvement. The town clerk is hereby directed to place said assessments upon the town tax duplicate, and to charge the same respectively against the several lots and parcels of
41 ground against which they have been so assessed, as follows, to-wit:—ten per cent. for each successive year for ten years, together with interest on the several amounts so assessed at six per cent. per annum. payable semi-annually, calculated from April 26, 1899, the date of the approval of this estimate, until the several amounts fall due. The first ten per cent. of said assessments, with interest on the whole from the date of the approval of this estimate, shall be due and payable on the first Monday in November, 1899. The semi-annual interest on the unpaid balance shall be due and payable thereafter at the dates of the semi-annual payment of town taxes in each year; and on the first Monday in November in each year thereafter, one tenth of the principal of said assessment, together with the semi-annual interest on the unpaid balance, shall be due and payable until all is paid.

Provided however, that the above provision for extending said assessments upon the town tax duplicate and collecting the same successively in annual and semi-annual installments of principal and interest respectively, shall apply only to the owner or owners of said lots or parcels of ground who shall promise and agree in writing filed with the town clerk of said (?) town, that in consideration of having the right to pay his or their assessment or respective assessments in installments, they will not make any objections to the illegality of irregularity as to their respective assessments and will pay the same when due, with interest thereon not exceeding six per cent. as shall by ordinance or resolution of the board be prescribed or required. The said assessments, together with interest thereon, shall from this date be a lien upon the several lots and parcels of
42 ground against which they are assessed respectively to the same extent that taxes are a lien upon such property; and the said assessments when placed upon the town tax duplicate, shall be collected in the same way that town taxes are collected. All said assessments not so extended upon the town tax duplicate, pursuant to the above proviso, shall be at once due and payable, and shall be

collected by precept and sale as provided by law. The proceeds from such assessments as are so placed on the town tax duplicate shall constitute a special fund to be applied to the payment of the costs of the said improvement and of the bonds and certificates to be issued therefor, and for no other purpose.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board, to-wit: Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement, and assessed therefor at the said rate of $3.54 per lineal front foot.

That on the 20th day of May, 1899, the finance committee made a report to the board upon the guarantee and coupon fund, which report showed the amount of the roadway repair guarantee fund to be $3152.12, and of the coupon guarantee fund $1096.48; that said report was adopted; that the said board thereupon by resolution provided for the issuing of improvement bonds for the sum of $13,736.40 on account of a part of said improvement.

That of the improvement of said Washington street from Wallace street to Central avenue a part thereof, to-wit:—a frontage of 801.80 feet on the south side of said Washington street and directly west of Wallace street is outside the corporate limits of the said town of Irvington and outside the jurisdiction of said town board;
43 that said John Moore had knowledge thereof at time of bidding upon said improvement, that said William C. Smith had knowledge thereof at the time he accepted the assignment of the contract for said improvement from said Moore.

That on the 4th day of April, 1898, this defendant commenced an action against the said Town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents, from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town; that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of this defendant's property and was wholly void and without warrant of law.

That all of the foregoing acts of said board of trustees and each and every of said acts, ordinances and proceedings of said board separately, were opposed to and in violation of the constitution and statutes of the State of Indiana, and also opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States of America, and that said acts, ordinances and proceedings of said board and each and every of said acts, ordinances and proceedings separately, were null, void, invalid and of no effect.

4" Par.

Fourth paragraph. The defendant, Sarah A. Hibben, for her separate and fourth paragraph of answer to plaintiff's complaint says:—

44 That on the 23rd day of February, 1898, the board of trustees of the town of Irvington did by resolution declare the necessity for and by ordinance provide for the making of the street improvements set out and described in plaintiff's complaint; that said ordinance provided that the cost of said improvement (except the proportion thereof occupied by street and alley crossings) should be assessed per lineal front foot against the real estate abutting thereon; that on the 24th day of February and the 3rd day of March, 1898, the said board caused to be published a notice to property owners that on the 21st day of March, 1898, objections might be made to said board to the necessity for such improvements; that on the 24th day of February and on the 3rd and 10th days of March, 1898, said board caused to be published a notice that on the 28th day of March, 1898, the said board would receive proposals for making said improvement of either macadam, brick or asphalt as might be determined after receiving the bids; that said notice provided that the work should be done in accordance with the plans and specifications therefor on file in the office of the engineer of the said town; that on the 7th day of March, 1898, said board adopted specifications for said improvements; and that said specifications provided among other things that said proposals must state the price per lineal foot front on each side, including all items, such amount to be ascertained by dividing the total cost by double the length of the street; that on the 21st day of March, 1898, this plaintiff, together with other property owners did object orally and in writing to said improvements, for the reason that the cost of said improvement would be greatly in excess of the benefit thereof, and filed their said objections with said board; that said objections were disregarded.

45 That on said 28th day of March, 1898, said board received bids as advertised and on the 4th day of April, 1898, said board accepted the bid of one John Moore to make said improvements of brick for the sum of three dollars and fifty-six cents ($3.56) per lineal front foot on each side, and by ordinance directed the making of such improvement; that on the 30th day of April, 1898, said board entered into a written contract with said John Moore to make said improvements for said sum of three dollars and fifty-six cents ($3.56) per lineal front foot on each side of the street, as provided in the ordinance of February 23, 1898, and according to the said plan and specifications.

That said Moore refused to commence work on said contract and on the 22nd day of July, 1898, William C. Smith, who was then — for more than six months prior to that time had been town civil engineer or Irvington resigned as said engineer; that thereupon said

Moore assigned the said contract to said Smith and said town board accepted said assignment and released said Moore.

That on the 31st day of August the said board changed the specifications and reduced the price of said improvements two cents per lineal front foot on each side.

On the 28th day of January, 1899, John V. Coyner, town civil engineer, submitted to said board a final estimate and made a report on said improvement, showing among other things the total cost thereof and the amount of the assessment against each abutting piece of property; that said report made a uniform assessment of three dollars and fifty-four cents ($3.54) per lineal front foot on each side; that on the 31st day of January and on the 7th day of February, 1899, said board caused to be published a notice that on the 15th day of February, 1899, a committee appointed by the said board would hear objections to such engineer's
46 report; that on the 26th day of April, 1899, the said board after extending to property owners an opportunity to make objection to said improvement, did by ordinance finally approve such engineer's report and confirm the assessment against each piece of abutting property, as made in said engineer's report, all in accordance with the said resolution of February 23, 1898; that said assessments were made and confirmed at the uniform rate of three dollars and fifty four cents ($3.54) per lineal front foot; and such board did by such ordinance direct the town clerk to place said assessments upon the town tax duplicate and to charge the same respectively against the several lots and parcels of ground against which they were assessed.

That on such hearing before said committee and on the hearing before said board of trustees no hearing was had upon and no consideration was given to the question of whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit of any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, established the theory of assessment at the same fixed price per lineal front foot on each side for the whole improvement
47 and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to the said engineer's report and the assessments therein based upon any inquiry into the amount of special benefit accruing to any lot or parcel of land.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that

two members of said board, to-wit:—Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at the said rate of $3.54 per lineal front foot.

That the total frontage of the defendant's land upon said improvements was 1129.52 feet and that the said town clerk in accordance with the said ordinance placed upon the town tax duplicate an assessment against defendant's said lands of $3.54 per lineal front foot, making a total of $5414.50. Said defendant further says that the said street so improved is of the aggregate length of five thousand, one hundred twenty six and fifteen hundredths (5126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1760 feet to the east line of the said town of Irvington; that on the west of said improvement the said Washington street is wholly unimproved for a distance of about 5115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the said improved portions of Washington street are a portion out of what is called the National road, which is a public highway extending from beyond the city of Indianapolis on the west through the country *beyond the city of Indianapolis on the west through the country* far to the east of the said town of Irvington; that said highway is much used by
48 the general public for travel and traffic from and to points *each* and west of said town of Irvington, that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington or to or from said town of Irvington; and but a small part of the travel along and over said improvement is to or from the property abutting thereon or by the owners of said abutting property; that a large proportion of the real estate fronting on said improvement is unimproved and is beyond the part of said town of Irvington where real estate is being improved; and is beyond that part of said town where improvements are likely to be made, and that there is no market for said real estate at this time and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved; that the street improvements described in plaintiff's complaint added nothing to the value of a large part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said defendant or to the other owners of the abutting property along the line thereof; that the said defendant and the other abutting property owners derive no more benefit from such improvement than the other residents of said town and the general public throughout said county of Marion; that of the real estate belonging to this defendant, viz: lots 53, 54, 55, 56, 57, 58, 59 and 60, are unimproved and unoccupied; that there is no sale or market for such lots at this time and there is no probability of there being in the near future any sale or market for said lots or for any of them for improving or building purposes or for any purpose by which said improvement of Washington street would be of any advantage

to or add to the value of said lots or any of them
49 that said improvement does not add to the value of said lots or of any of them; that said lots 53, 54, 55, 56, 57, 58, and 59 were of the value of four hundred dollars each; and that the assessment against said lots is in substantial, to-wit: $141.60 on each lot, excess of the special benefits received or which will be received by said lots; that said lot 60 is of the value of three hundred dollars and that the assessment against said lot 60 is in substantial, to-wit: $327.45, excess of the benefits received or which will be received by said lot; that the land belonging to this defendant and described in plaintiff's complaint as part W. ½ of S. W. ¼ sec. 3–15–4 is an irregular tract of 20.55 acres lying in the northwest part of the corporate limits of said town of Irvington, having a frontage of one thousand, one hundred fifty seven and two hundredths (1157.02) feet on the north side of Washington street and a depth of about 1237 feet; that said real estate is not platted into lots and that there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the ssaid improvements of Washington street are of no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars and that the assessment against said tract is in substantial, to-wit: $4095.85 excess of the special benefit received or which will be received by said tract from said improvement.

That on the 4th day of April, 1898, this defendant com-
50 menced an action against the said Town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town; that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of this defendant's property.

This defendant further alleges that by reason of the acts of said town board of trustees in passing said ordinance declaring the necessity for and providing for said improvement of Washington street and in approving and confirming the engineer's report and the assessments made therein on the 26th day of April, 1899, and by each and every act of said board connected with or relating to the said improvement, the defendant's property is taken without compensation and without due process of law and that all of the said acts of said board and each of said acts is contrary to and in violation of the constitution and laws of the State of Indiana and contrary to and in violation of the Constitution of the United States of America

and particularly of the first section of the fourteenth amendment to the Constitution of the United States of America.

Wherefore, defendant, Sarah A. Hibben, prays that said assessment be declared void and that defendant have judgement for costs.

M. W. HOPKINS,
R. T. MACFALL,
Att'ys for Def't Hibben.

51 "And plaintiff is ruled by the court to reply to said answer."

And afterwards to-wit: on the 2nd day of June, 1900, being the 24th day of the May term, 1900, of the said court, before the same hon. judge, the following proceedings were had herein, viz:

"Comes the defendant, Sarah A. Hibben, by counsel and files her fifth paragraph of answer to the complaint herein as follows:"

Fifth Paragraph of Answer of Defendant Sarah A. Hibben.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN, THE FINANCIAL EXCHANGE, JOSEPH A. Pattison, Elwood W. Seamans, and Indiana Bermudez Asphalt Company.

The defendant, Sarah A. Hibben, for her separate fifth paragraph of answer to so much of plaintiff's complaint as seeks to establish and enforce a lien against certain real estate described in the engineer's report and the assessment rolls as 1157.02 feet, being "part W. ½, S. W. ¼, sec. 3-15-4," says:—

That said real estate is described in said engineer's report and the assessment thereon therein made and as approved and confirmed by the board of trustees of said town as follows:—

"*Estimate Roll, North Side.*"

* * * * * * *

No.	Owner's name.	No. of feet.	Description.	Assessment.
36	Sarah A. Hibben	1157.02	Part W. ½, S. W. ¼, sec. 3-15-4	$4095.85."

That neither said engineer's report and the assessment therein, nor any of the proceedings or doings of the engineer of the said town of Irvington or of the board of trustees of said town or of any

committee of said board, contains any other further or more
52 complete description of said real estate.

Wherefore said defendant says that said assessment is invalid and of no effect and prays for judgment.

M. W. HOPKINS,
R. T. MACFALL,
Att'ys for Defendant Sarah A. Hibben.

"And the plaintiff is ruled by the court to reply to said fifth paragraph of answer herein."

And afterwards, to-wit: on the 13th day of October, 1900, being the 12th judicial day of the October term, 1900, of said court, before the same hon. judge, the following proceeding was had herein, viz:

"Comes the plaintiff by counsel and files his separate demurrer to the second, third, fourth and fifth paragraph- of answer of defendant Hibben herein, as follows, viz:"

Demurrer to 2", 3", 4", & 5" Par. of Ans.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774.
vs.
HIBBEN ET AL. }

Demurrer to answers.

The plaintiff demurs to the second, third, fourth and fifth paragraphs of answers of the defendants in the above entitled cause and to each of said paragraphs of answer separately and for cause of demurrer says, that neither of said paragraphs of answer states facts sufficient to constitute a cause of defense in the above entitled cause.

Wherefore plaintiff demands judgement according to his complaint and all proper relief.

HARVEY, PICKENS, COX & KAHN,
Attorneys for Plaintiff.

And afterwards to-wit: on the 17th day of October, 1900,
53 being the 15th judicial day of the October term, 1900, of said court, before the same hon. judge, the following proceedings were had herein, viz:

Demurrer to 5" Par. Ans. Overruled; Demurrer to 2", 3", & 4" Par. Ans. Sust.

"Come the parties by counsel and the court, being fully advised, in the premises, sustains the plaintiff's demurrer to the second, third and fourth paragraphs of the answer of defendant, Sarah A. Hibben, herein, to which ruling said defendant at the time excepts, and the court being fully advised overrules the plaintiff's demurrer to the fifth paragraph of the answer of said Sarah A. Hibben herein, to which ruling plaintiff, at the time excepts and he is now ruled to reply."

And afterwards, to-wit: on the 8th day of November, 1900, being the fourth judicial day of the November, term, 1900, of said court, the following proceedings were had herein. Comes the defendant, Sarah A. Hibben, and files her cross-complaint against the plaintiff and her co-defendants and process is ordered to issue thereon, returnable 20th of November, 1900."

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court of Marion County, Room 3.

WILLIAM C. SMITH *vs.* SARAH A. HIBBEN, THE FINANCIAL Exchange, Joseph A. Pattison, Elwood A. Seamans, Indiana Bermudez Asphalt Company.	No. 58774. Cross Complaint of Sarah A. Hibben.

1*st Par. Cross-Complaint*

First paragraph. The defendant, Sarah A. Hibben, for her first paragraph of cross complaint against the plaintiff, Wiliam C.
54 Smith, and against her co-defendants, The Financial Exchange, Joseph A. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company says:—

That the street improvement set out and described in plaintiff's complaint was made and the liens therefor sought to be enforced in said complaint were attempted to be created by the board of trustees of the town of Irvington under the authority of and in accordance with the provisions of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and boards of trustees and providing the mode and manner of making street and alley improvements and building sewers, and providing for the mode and manner of enforcing the payment of the costs of street

and alley improvements and building sewers, and permitting cities or incorporated towns to issue street and sewer improvement bonds and repealing all conflicting laws, and declaring an emergency," approved March 8, 1889, being chapter XVIII of the Laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, and acts amendatory thereof, said act and such amendatory acts being sections 4288 to 4299, both inclusive, of Burns' Revised Statutes 1894.

That said act and the amendments thereto and each and every section of said act and of said amendments are all and each section separately opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States and of sections 12 to 21 of the bill of rights and of section 1 of article 10 of the constitution of the State of Indiana and that said sections and each of them are null, void and invalid and of no effect.

55 That the cross complainant is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1529.52 feet; that said real estate is described in plaintiff's complaint and in the assessment roll as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place and also a part of W. ½ of S. W. ¼ sec. 3–15–4, and all more fully described as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, and also a part of the west half of the southwest quarter of section three (3), township fifteen (15) north, range four (4) east, all in Marion county, Indiana; that said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot, making an aggregate assessment of $5414.50; that said assessments is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore, the cross-complainant prays that the assessments against her real estate may be declared illegal, null and void, and that said assessments be adjudged to be cancelled, and cross-complainant's title to said real estate be quieted, and the plaintiff, William C. Smith and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them, or any of them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

2" Par. Cross-comp.

Second paragraph. The defendant, Sarah A. Hibben, for her second and further paragraph of cross-complaint against the plaintiff, William H. Smith, and against her co-defendants, The

56 Financial Exchange, Joseph Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, says:—

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington by resolution and ordinance declared the necessity for and provided for making the street improvement described and set out in plaintiff's complaint; that said resolution and ordinance was in the words and figures following, to-wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two thirds of the members of said board concurring:

First. That a necessity exists for the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue.

Second. That the said improvement shall be made in the following manner, to-wit:— * * *

All of the said work to be done to the satisfaction of the town engineer and the said board of trustees and in accordance with the plans and specifications therefor adopted by said board.

Third. The cost of the said improvement (except the proportion thereof occupied by street and alley crossings) shall be assessed per lineal foot against the real estate abutting thereon. * * *

All to be done in accordance with the provisions of an act of the General Assembly of Indiana concerning street improvements, approved March 8, 1889, and the acts amendatory thereof. * * *

Sixth. An emergency exists for the immediate taking effect of this resolution, therefore the same shall be in force from and after its passage."

That on the 24th day of February and the 3rd day of
57 March, 1898, the said board caused to be published a notice to property owners that on the 21st day of March, 1898, objections might be made to said board to the necessity for such improvement; that on the 24th day of February and on the 3rd and 10th days of March, 1898, said board caused to be published a notice that on the 28th day of March, 1898, the said board would receive proposals for making said improvement; that said notice provided that the work should be done according to the said resolution of February 23rd, 1898, and according to the plans and specifications on file in the office of the town engineer.

That on the 7th day of March, 1898, the said board by ordinance approved the specifications for said improvement; that the specifications so approved were the general specifications of the city of Indianapolis for the year 1898, subject to the necessary verbal changes, and that the specifications so approved were placed on file in the office of said town engineer and were the basis of the bids hereinafter mentioned, including the bid finally accepted by said board, and such specifications became a part of the contract under which the plaintiff made the street improvement set out and described in his complaint.

That said specifications provided among other things that upon notice from the town board the contractor should discontinue work during the winter months and place the work in condition to accommodate the public and protect the work; that all work and material must be satisfactory to the engineer and must be approved by

the town board; that "should the engineer require it, the contractor shall at any time during the period of construction or maintenance of the work contracted for, make such openings and to such extent, through any part of said work as the engineer may direct,
58 and he shall make the same good again to the satisfaction of the board;" that during the progress of the work and during a period of seven years from the date of the approval of the assessment roll, the whole work should be at the contractor's risk and he should be responsible for any and all damages to persons or property on account of the work, whether occasioned by rise in the river, floods, back water, caving, settling of tranches or foundations of buildings, or any portion of the improvement; derangement of alignment, defect in surface, foundations or other appurtenances, or otherwise occasioned; that without additional compensation the contractor should make good any such damage to the work and should make good any defect in the workmanship, materials or condition of the work during the said period of seven years; that said contractor should keep said work in repair during the said period of seven years and should make all repairs at such time as directed by the board or the engineer, and that such obligation on the part of the contractor should cover and include all repairs growing out of the imperfection or unsuitability of materials or compositions, too great or too little moisture, all defects of workmanship, extremes of heat or cold, and all other effects of climate, and cover all other excessive deteriorations, viz:—any holes or cracks in said pavement and any defects resulting from the decomposition of the wearing surface or foundation and that the pavement at the expiration of the said period of seven years should be in good condition and present surface so true and even that it should in no way be an obstruction to travel, and have drainage so perfect that water should collect in no place to a depth of more than one-quarter of an inch; that the determination of the character, amount, extent and necessity
59 for repairs should rest entirely with the board and its decision should be final and obligatory upon the contractor and that such determination might extend to the total reconstruction of the whole body of the work; that upon failure of the contractor to so repair or reconstruct, the said board might make such repairs or reconstruction at the expense of said contractor; that said board should retain out of the cost of said improvement a sum equal to 20 cents per square yard as a repair guarantee fund to secure the repair and maintenance of said pavement by the contractor in accordance with the contract for the construction, repair and maintenance thereof; that the contractor should deposit with the said town a sum equal to three per cent. of the total cost of the said improvement as a coupon payment fund to meet the payments on delinquent bonds and coupons issued on this improvement; that the bidder in submitting his bid should state the price per lineal foot on each side, the amount to be ascertained by dividing the total cost of the improvement, including all appurtenances and maintenance for the said period of seven years by double the length of the

street given in the specifications; that the contractor should not assign or transfer the contract or sub-let the work or any part thereof; that the contractor must have an office or agent in the city of Indianapolis during the period of construction and during said period of seven years; that the location of this office or the post office address of the agent must be filed with the board, and notice sent to such office or agent at the address on file in the office of the board should be considered full and sufficient notice under these specifications; that all surplus earth removed by the contractor should be hauled to such streets, alleys or
60 other places as might be directed by the said board and engineer within a distance of 1000 feet and shaped to the satisfaction of the said board and engineer; that the curbing should be under the same guarantee as the street surface; that the board would reserve the right to change the kind of brick to be used in said pavement even after the contract was let; that the estimated length of street to be improved was 5155 lineal feet; that the width to be graded was 42 feet; that the width to be improved was 26 feet; that the estimated amount of gravel concrete was 15892 square yards; that the estimated amount of curb and gutter was 9600 feet and 387 feet round corner curb; that the estimated amount of marginal stone was 10485 feet; that there were five man holes and catch basins and 14 iron inlets; and 10310 feet of drain tile; that the guarantee fund would be estimated upon the area of the pavement from face to face of curbing.

That on the 21st day of March, 1898, this defendant, along with other property owners along the line of said proposed improvement filed with the said board of trustees their written objections to said proposed improvement; that the total frontage of property owners along said proposed improvement was 9266.65 feet; that said owners so objecting owned an aggregate frontage of 6263.28 feet, that in said written objections the objectors asked that neither of the improvements provided for in said ordinance of February 23, 1898, be made for the reason that the probable expense would be largely out of proportion to the value of the abutting property and would in several instances exceed its total value and work a forfeiture of the property, and that any of the proposed kinds of improvement would be of no more value to the property than a less expen-
61 sive improvement.

That said board took no action on said objections and on March 28, 1898, received and opened bids for said improvements; that on the 4th day of April, 1898, said board accepted the bid of one John Moore to make said improvement of brick for the sum of $3.56 per lineal front foot on each side and by ordinance directed the making of said improvement, which ordinance was in the words and figures following, to wit:—

"Resolved by the board of trustees of the town of Irvington, Indiana, two-thirds of the members of said board concurring, That whereas it has heretofore been declared by this board by a resolution passed on the 23rd day of Feb. 1898, that a necessity existed for

the improvement of the roadway of Washington street in the said town from Wallace street to Central avenue and that the same should be graded as therein provided and that upon such grade there should be constructed one of three kinds of improvement therein set out as might be determined by this board upon the openings of bids on each of said kinds.

Now therefore it is hereby resolved by the said board that the said roadway shall be improved by constructing thereon the following improvement, viz:—a brick pavement of paving blocks laid upon a concrete base, with combined curb and gutter composed of sand, cement and crushed granite and along the side of the improvement next to the street car tracks in the center of the roadway shall be placed a marginal curb of stratified limestone, the same being one of the kinds of improvement provided in the said resolution, which shall be constructed in accordance with the provisions of the said resolution passed on the 23rd day of Feb. 1898, and the
62 plans and specifications for such improvement heretofore adopted by this board and resolved further that the bid of John Moore for the construction of the said improvement heretofore received by this board proposing to make the same for $3.56 per lineal front foot on each side by and the same is hereby accepted and the said John Moore shall enter into a formal contract for the performance of the said work and file his bond as provided in the specifications within ten days, and the judiciary committee is directed to prepare said contract.

Resolved further that all the checks received with bids upon the said improvement, except the check received with the bid of John Moore be returned by the treasurer to the persons to whom they belong."

That on April 11th the said board by ordinance provided that the Indiana paving block manufactured at Brazil, Indiana, should be used in making said improvement.

That such further proceedings were had that on the 30th day of April, 1898, the said board entered into and signed a contract with said John Moore and accepted his bond to construct the improvement hereinbefore mentioned and described, which contract and bond were in the words and figures following, to-wit:—

"This agreement, entered into this 18th day of April, 1898, by and between John Moore of the county of Marion and State of Indiana, party of the first part, and the Town of Irvington, State of Indiana, Marion county, party of the second part, under and by virtue of an act of the General Assembly of the State of Indiana entitled "An act concerning powers and duties of cities and incorporated towns and their common councils and board of trustees and providing the mode and manner of making street and alley improvements and
63 buiding sewers and providing for the mode and manner of enforcing the payments of the costs of street and alley improvements and building sewers, and permitting cities or incorporated towns to issue street and sewer improvements bonds" approved March 8, 1898, and acts amendatory thereof.

Witnesseth: That the party of the first part covenants and agrees, etc. * * * all for the sum of three dollars and fifty-six cents ($3.56) per lineal foot on each side of said improvement complete, according to a resolution adopted by the board of trustees of said town on the 23rd day of February, 1898, and the plans, profiles and specifications are made a part hereof as fully and effectually as if copied herein at full length. * * * that for and during the time of the making of said improvement, and the period for which the same is to be maintained and kept in repair by him, he will save the town of Irvington harmless from any and all liability growing out of any injury or damage to property or persons because of any neglect or fault of himself or his agents or employees in the execution of this contract, or because of any neglect or fault of himself or his agents or employees in any matter connected therewith or related thereto, and to pay any judgements with costs, which may be obtained against said town on account of any such injury or damage.

It is mutually understood and agreed that the second party shall be liable to said first party for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing, and for no more. * * *

64 It is hereby expressly agreed that no assignment of this contract shall be made to any party without the consent of said board of trustees in writing, and any assignment without such consent first had, shall nullify this contract.

It is further agreed that the said town shall not be liable to said first party or his assigns for any delay or loss in the payment of assessment or interest thereon by the property owners who fail or refuse to sign a waiver, availing themselves of the ten year installment plan of payment as provided by law, or for attorney's fees; and that although suits for the collection of such assessments may be brought in the name of said party of the second part, said town shall not be or be held liable for the cost or expense of such suits, or for any failure to recover the amount or amounts therein claimed to be due.

The party of the first part hereby consents that the said town shall retain out of the total amount shown by the final estimate to be due from the said town on account of street and alley crossings, a sum equal to twenty cents per square yard for each square yard of pavement constructed, which sum shall be and constitute a repair guarantee fund in the hands of said town for the purpose of securing the repair and maintenance of said pavement by the contractor to the satisfaction of the board.

In the event the sum above specified shall exceed the amount due said contractor from said town on account of street and alley crossings, then said contractor shall deposit a sum sufficient to make said guarantee fund equal to twenty cents per square yard for each square of improvement constructed. This guarantee fund, or only such

part of it as shall remain in the hands of the town unexpended as above provided at the expiration of said guarantee period,
65 shall then be paid to the contractor with interest at the rate of five per cent. per annum.

Provided: that no interest shall be paid upon any part of said fund which the town may have been compelled to expend for repair at any time within said guarantee period of seven years.

Provided: also that no interest shall be paid until the expiration of said guarantee period. Interest however may be paid annually on order of the board if the roadway is properly maintained by the party of the first part.

The contractor, party of the first part, hereby contracts and agrees to deposit with the town upon the certificate of the engineer showing the total cost of the improvement, a sum equal to three per cent. of said total cost, which sum shall be and constitute a fund in the control of the town's treasurer to be known as the coupon payment fund, which fund shall be used by said treasurer to meet the payment of all delinquent bonds and coupons issued by the town upon their improvement.

The moneys taken from such fund for the purpose herein named shall be replaced and paid back into the fund as rapidly as such delinquencies are paid into the treasury. Said treasurer shall issue to the party of the first part a certificate of the amount retained, which shall not bear interest and shall be payable to the contractor or his order by the treasurer of said town two (2) years after the date of its issue.

It is hereby agreed that neither of said funds above specified shall at any time during the period for which they are retained be decreased by the said party of the first part.

In the event the pavement during the guarantee period
66 is not in good condition and repair to the satisfaction of the board of trustees of said town and if the first party shall refuse or neglect to put the same in repair to the satisfaction of said board on fifteen (15) days' notice, said board may cause the same to be done and pay for the same out of the guarantee fund above provided for, and said sum or sums so paid for such repairs out of said guarantee fund shall constitute and be considered a payment by the said town upon the amount due from it to the contractor on account of the cost of street and alley crossings, and the town shall retain the balance of said fund, if any, in said repair guarantee fund for use in future repairs. Should the cost of such repairs made by order of the board of trustees exceed the amount retained as above provided, or the amount of said repair fund remaining on hand at the time of making such repairs, the party of the first part shall be held responsible to the town for the amount of such excess, and such excess shall be collected by suit from the contractor. * * *

To each of the conditions and stipulations of this contract, the undersigned, John Moore, party of the first part, and Town of Irvington, party of the second part, each binds himself and itself and their successors and assigns.

In witness whereof, we, the foregoing named parties, hereunto set our hands, this 18th day of April, 1898.

JOHN MOORE.
TOWN OF IRVINGTON.
HILTON U. BROWN,
President Board of Trustees.
C. B. CLARK, *Clerk.*

Bond.

Know all men by these presents that I, John Moore, as principal and Joseph T. Gest, Daniel Lesley and George H. McCaslin, of
67 the county of Marion and State of Indiana, as sureties, are held and firmly bound to the Town of Irvington, Indiana, in the sum of eighteen thousand, three hundred and fifty dollars ($18,350) for the payment of which well and truly to be made we jointly and severally bind ourselves our heirs, executors, administrators and assigns firmly by these presents.

The conditions of the above obligation are such that if the above named John Moore shall faithfully comply with the foregoing contract made and entered into this 18th day of April, 1898, with the town of Irvington, Indiana, and shall fulfill all the conditions and stipulations therein contained, according to the true intent and meaning thereof, in all respects, then this obligation to be void, otherwise to be and remain in full force and virtue in law. In the event the said town shall extend the time for the completion of said work, such extension shall not in any way release the sureties on this bond.

This shall be a construction bond, and the sureties to the same shall not be held responsible for the maintenance and repair of the pavement after it has been accepted by the second party, but such sureties shall be held responsible for the faithful compliance with all the other conditions and restrictions set out in the contract.

Witness our hands and seals the day and year last above written.

JOHN MOORE. [SEAL.]
JOSEPH T. GEST. [SEAL.]
DANIEL LESLEY. [SEAL.]
GEO. H. McCASLIN. [SEAL.]

That on July 20th, 1898, John Moore notified the board that he would not proceed with the work and thereupon he made an
68 agreement with the plaintiff, William C. Smith, who for more than six months prior to that time had been the town civil engineer, to assign said contract to said Smith; that thereafter and on the 22nd day of July, 1898, the said Smith offered to said board his resignation as such engineer, which resignation was accepted; that on the same day said John Moore assigned and transferred his said contract to the said Smith; that on the same day the said board

by resolution approved of and accepted said assignment and released said John Moore from all liability on his said contract and bond, which resolution was in the words and figures following, to-wit:—

"Whereas the board of trustees of the town of Irvington passed a declaratory resolution for the improvement of Washington street on the 23rd day of February, advertising for the reception of bids on the 28th day of March, 1898, and

Whereas, at said date of receiving bids said board was restrained by the superior court on application of one Hay, a non-resident, supported by Harold Hibben, a non-resident. That thereupon said board received said bids and subsequently on April 13, 1898, said superior court held said resolution good, valid and legal and held in all things in favor of said board and thereupon said Hay prayed an appeal to the supreme court, said appeal being dismissed by said court in due time. In the meantime the said Hibben, non-resident, filed before the Hon. Judge L. M. Harvey, of the superior court, a like suit, in fact a duplicate of the Hay case, except as to name of plaintiff, and

Whereas, this board awarded the contract to John Moore for the improvement of said street with brick on his bid of $3.56 per lineal foot on each side, and

Whereas said Moore entered into the execution of said contract and bond on the 18th day of April, 1898, and

69 Whereas on the 20th day of July, 1898, said Moore served notice formally upon said board that he was unable to fulfill his contract and was ready and willing to assign the same to any one acceptable to said board, and

Whereas said Moore by written consent of said board, having assigned said contract and matters and things thereunder to William C. Smith, which said assignment is in the words and figures as follows, to-wit:— * * *

Therefore, be it resolved by the board of trustees of the town of Irvington, Indiana, that the said assignment is hereby accepted, ratified and approved and that William C. Smith is the recognized contractor for the construction of said street under said contract and that the said Moore by virtue thereof is hereby released from all obligation thereunder and his bond is hereby cancelled.

Further, be it resolved that the said William C. Smith be required to file with said board a bond in the sum of $18,350 within a reasonable time from the adoption of these resolutions and shall place on file an indemnifying bond that he will carry out the provisions of this resolution, and in all respects complete the work according to plans and specifications adopted by the board."

That the Harold B. Hibben named in the foregoing resolution is the son of and business manager for the cross-complainant, Sarah A. Hibben, and the suit mentioned in said resolution was filed by and in the name of this cross-complainant and not by and in the name of said Harold B. Hibben.

That thereupon said William C. Smith accepted said assignment and proceeded with the construction of the improvement; that af-

terwards during the construction of said improvement the said board employed said Smith to do the work of a civil engineer for said town; that on August 10, 1898, the said board employed
70 John V. Coyner as town civil engineer for the balance of the year 1898; that on the 31st day of August, 1898, the board directed the contractor to leave the drain tile out of the improvement and allow therefor a rebate of two cents per lineal front foot on each side.

That on the 28th day of January, 1899, the town civil engineer submitted to the said town board the final estimate of the total cost of said improvement and at the same time made to said board a report upon said improvement, which report apportioned the entire cost of such improvement against all the abutting property on the uniform basis of $3.54 per lineal front foot on each side, which report was in the words and figures following to-wit:—

"INDIANAPOLIS, INDIANA, *Jan.* 26, 1899.

To the town board of Irvington.

GENTLEMEN: I beg to submit to you for your consideration, the assessment rolls for the improving of Washington street from Central avenue to Wallace street as per Mr. W. C. Smith's contract.

This is not to be considered as an acceptance of the work, as there are several things to be done by the contractor before the contract is completed. Some of these things can be done at this time of year and are being pushed as fast as the weather will permit, but others must lay over until spring and settled weather, when everything can be completed and a final inspection made before the improvement is accepted.

I may mention here that item No. 60 on sheet 2 south side is not incorporated within the town.

I also submit the extra for paving done by the contractor, Mr. Smith. This extra was caused by the changing of the tracks
71 from double to single at the curve of Washington Street and Central Avenue intersection. The contractor was compelled to change some of the marginal curb that had been placed in position as originally intended and the trenches were excavated for the remainder before I was notified of any change.

I consider the price, 25c. per square foot, a reasonable and just price for the same—not counting the delay and inconvenience caused by the above change of tracks.

The amount of extra surface paved—1024 8/10 square feet at 25c. per square foot, equals $256 20/100—which I submit for your consideration.

Respectfully,

JOHN V. COYNER.

Irvington, April 26, 1899.

INDIANAPOLIS, IND., *Jan'y 26th*, 1899.

To the town board of Irvington.

GENTLEMEN: In compliance with section 45 of the general specifications, I submit the following:

Total square yards of improved surface, including the extra work at east end..... $36,549 36/100

Respectfully, JOHN V. COYNER.

April 26, 1899.

Estimate Roll, North Side.

IRVINGTON, IND., *Jan'y 28th*, 1899.

To the town board of Irvington.

GENTLEMEN: I herewith report an estimate roll for grading and paving with brick Washington street from Central avenue to Wallace street based upon the terms of the contract of William C. Smith, contractor for said work.

Total length frontage of improvement 5126 15/100 feet.

72 Average cost per lineal front foot $3.54. Total cost of improvement $18,146 57/100.

Owner's name.	No. of feet.	Description.	Assessment.
* * * *	* *	* * * * *	* *
36 Sarah A. Hibben.....	1157 2-100	Part W. ½ S. W. ¼ sec. 3-15-4.....	$4095.85
37 Town of Irvington.....	45	National avenue.....	159.30
38 H. U. Brown and A. H. Hannah.	353 10-100	Part E. ½ S. E. ¼ sec. 4-15-4.....	1249.97
* * * *	* *	* * * * *	* *

Estimate Roll, South Side.

8 J. C. and M. Barnhill	69	Lot 3 Thompson's sub..	212 40
* * * *	* *	* * * * *	* *
46 Sarah A Hibben	40	Lot 53 Pattison's University Place add	141.60
47 Sarah A. Hibben	40	Lot 54, Pattison's University Place add.....	141.60
48 Sarah A. Hibben	40	Lot 55, Pattison's University Place add.....	141.60
49 Sarah A. Hibben	40	Lot 56, Pattison's University Place add.....	141.60
50 Sarah A. Hibben	40	Lot 57, Pattison's University Place add.....	141.60
51 Sarah A. Hibben	40	Lot 58, Pattison's University Place add	141.60
52 Sarah A. Hibben	40	Lot 59, Pattison's University Place add.....	141.60
53 Sarah A. Hibben	92 50-100	Lot 60 Pattison's University Place add.....	327.45
* * * *	* *	* * * * *	* *
58 H. U. and J. H. Brown and M. E. Hannah.	606 85-100	Lots 46, 47, 48 and vacated street, also part S. E. ¼ of S. E. ¼ sec. 4-15-4.	2360.65
59 A. P. Stanton, trustee.....	712 17-100	Part S. E. ¼, sec. 4-15-4	2521.08
60 A. P. Stanton, trustee.....	92 74-100	Part S. E. ¼, sec. 4-15-4.....	328.19
* * * *	* *	* * * * *	* *

I hereby certify that the above estimate is correct.

JOHN V. COYNER,
Town Civil Engineer.

The said engineer's report was by the said board referred to the committee on streets, alleys and contracts, and February 15, 1899, was fixed as the date for a hearing upon such report before said committee, notice of which hearing was given by publication.

That on the 7th day of March, 1899, the said board granted an extension of time to enable the contractor to complete
73 said improvement according to the specifications and directed the committee on streets, alleys and contracts to procure from the city engineer of Indianapolis an opinion as to what was necessary to complete said improvement, and to employ said city engineer to oversee the completion of said improvement; that on the 25th day of March, 1899, the said committee on streets, alleys and contracts offered a report on such engineer's report, recommending that the board approve such engineer's report; that on the 26th day of April, 1899, B. J. L. Jeup, such engineer of the city of Indianapolis, made to said board a report upon said improvement which report set out a number of things which should be completed by the contractor, and recommended that after their completion the assessments made by said Coyner in such engineer's report be allowed; that on the 26th day of April, 1899, the said board extended to property owners an opportunity to make objections to said improvement; that on said 26th day of April, 1899, the said committee on streets alleys and contracts, offered a substitute report on such engineer's report; that said substitute report set out that a hearing had been had on such engineer's report on the 15th day of February, 1899; that said substitute report found that the measurements in such engineer's report and the amounts assessed therein were correct and recommended the passage of an estimate resolution approving and confirming the assessments as made by said town engineer in such engineer's report, which substitute report of the committee was in the words and figures following, to-wit:—

"Your committee on streets, alleys and contracts to whom was referred the estimate roll by the town civil engineer for the construction of a brick pavement in Washington street from
74 Central avenue to Wallace street begs leave to report that a meeting of the committee was held on February 15, 1899, at 8 o'clock p. m. in the rooms of the town board pursuant to notice duly given to hear objections, if any, of the property owners affected by said estimate; that questions were raised by Thomas L. Thompson and Charles M. Cross as to the accuracy of the measurement of their respective frontages and that further hearing was accorded them and other citizens with the result that the committee finds from the data at command and supplied by the engineer that the measurements in the estimate and the amounts assessed are correct. The committee having further satisfied itself that the additional work required by the engineer has been performed by the contractor, now and hereby recommend the passage of the estimate resolution approving and confirming estimates as made by the engineer for the construction of the said pavement. Your committee also recommends that a contract be required of the contractor, W. C. Smith, to put in repair 100 feet of curbing on the north side of Washington street between Pleasant run and (National) Emerson

avenue; and 160 feet on the south side of the street west of the Pleasant Run bridge and other portions of curb indicated in engineer Jeup's report to the board and that $225.00 in cash additional to guarantee fund, be required for the performance of said work.

Your committee also reports that Susan Davis contends that a private roadway should have been left into her grounds when the curb and roadway were constructed—the committee recommends that the said property owner be guaranteed a driveway at a cost not to exceed the cost of said driveway at the time said roadway was constructed, to-wit: $24.85.

JESSE SUMMERS,
HILTON U. BROWN,
J. C. BARNHILL,
Com."

75 That on such hearing before said committee on streets, alleys and contracts and on the hearing before said board of trustees, no hearing was had upon and no consideration was given to the question whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than, or in excess of the amounts fixed by the assessments in the said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done, and that said hearing before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief on the part of said board and of the members thereof that the statutes of the State and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board, and the contract for said improvement, established the rule of assessments at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearings to hear or consider any objection to said engineer's report and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

That said substitute report was adopted and that thereupon on the said 26th day of April, 1899, the said board by ordinance accepted said improvement and adopted and approved such engineer's report and approved and confirmed the assessments set forth
76 in such engineer's report which approval and confirmation was in the words and figures following, to-wit:

"Resolved by the board of trustees of the town of Irvington Indiana.

That the report of the committee on streets, alleys and contracts recommending the approval of the final estimate made by the town civil engineer in favor of William C. Smith, contractor for the im-

provement of roadway of Washington street from the west property line of Wallace street to the east curb line of Central avenue pursuant to resolution passed on the 23d day of Feb'y 1898, be and the same is hereby approved.

That the assessments set forth in said final estimate are hereby approved and confirmed, and there is hereby assessed against the several lots and parcels of ground as described in said final estimate, the several amounts set opposite and assessed against said several lots and parcels of ground respectively, for and on account of said improvement. The town clerk is hereby directed to place said assessments upon the town tax duplicate, and to charge the same respectively against the several lots and parcels of ground against which they have been so assessed, as follow-, to-wit: * * * The said assessments, together with interest thereon, shall from this date be a lien upon the several lots and parcels of ground against which they are assessed respectively to the same extent that taxes are a lien upon such property; and the said assessments when placed upon the town tax duplicate, shall be collected in the same way that town taxes are collected. All said assessments not so extended upon the town tax duplicate, pursuant to the above proviso, shall be at once due and payable, and shall be collected by
77 precept and sale as provided by law. The proceeds from such assessments as are so placed on the town tax duplicate shall constitute a special fund to be applied to the payment of the costs of the said improvement and of the bonds and certificates to be issued therefor, and for no other purpose."

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board, to-wit:—Hilton U. Brown and J. C. Barnhill, were the owners of lots abutting upon said improvement, and assessed therefor at the said rate of $3.54 per lineal front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accruing to the real estate abutting upon such improvement.

That said board retained of the contract price of said improvement the sum of $3152.12 on account of the roadway repair guarantee fund and the further sum of $1096.48 on account of the coupon guarantee fund.

That the said improvement is not of special and peculiar benefit to cross-complainant's real estate abutting upon said described improvement.

That of the improvement of said Washington street from Wallace street to Central avenue, a part thereof, to-wit:—a frontage of 801.80 feet on the south side of said Washington street and directly east of the intersection of said Washington and Wallace streets is outside the corporate limits of the said town of Irvington and outside the jurisdiction of said town board; and that said John Moore had knowledge thereof at the time of bidding upon said improvement and that said William C. Smith had knowledge thereof at the time

he accepted the assignment of the contract for said improvement from said Moore.

78 That on the 4th day of April, 1898, this cross-complainant commenced an action against the said town of Irvington and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town, that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56585 room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of cross-complainant's property and was wholly void and without warrant of law.

That all of the foregoing acts of said board of trustees and each and every of said acts, ordinances and proceedings of said board separately were opposed to and in violation of the constitution and statutes of the State of Indiana, and also opposed to and in violation of section one of the fourteenth amendment to the Constitution of the United States, and that said acts, ordinances and proceedings of said board, and each and every of said acts, ordinances and proceedings separately were null, void, invalid and of no effect.

That the cross-complainant is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1529.52 feet; that said real estate is described in plaintiff's complaint and in the assessment roll as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place and also a part of W. ½ of S. W. ¼ sec. 3–15–4, and more fully described as lots 53, 54, 55, 56, 57,

78½ 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, and also a part of the west half of the southwest quarter of section three (3) township fifteen (15) north, range four (4) east, all in Marion county, Indiana; that said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot, making an aggregate assessment of $5414.50 that said assessments is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore the cross complainant prays that the assessments against her said real estate may be declared illegal, null and void, and that said assessments be adjudged to be cancelled, and cross-complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them or any of them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

3" Par. Cross-comp.

Third paragraph. The defendant, Sarah A. Hibben, for her third paragraph of cross-complaint against the plaintiff, William C. Smith, and against her co-defendants, The Financial Exchange, Joseph A. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, says:—

That on the 23rd day of February, 1898, the board of trustees of the town of Irvington did by resolution declare the necessity for and by ordinance provide for the making of the street improvements set out and described in plaintiff's complaint; that
79 said ordinance provided that the cost of said improvement except the proportion thereof occupied by street and alley crossings, should be assessed per lineal front foot against the real estate abutting thereon; that said board gave notice to property owners by publication that on the 21st day of March, 1898, objection might be made to said board to the necessity for such improvement; that said board also gave notice by publication that on the 28th day of March, 1898, the said board would receive proposals for making said improvement of either macadam, brick or asphalt as might be determined after receiving the bids; that said notice provided that the work should be done in accordance with the plans and specifications therefor on file in the office of the engineer of the said town; that on the 7th day of March, 1898, the said board adopted specifications for said improvements; that said specifications provided among other things that said proposal must state the price per lineal foot front on each side, including all items, such amount to be ascertained by dividing the total cost by double the length of the street; that on said 21st day of March, 1898, this plaintiff together with other property owners did object orally and in writing to said improvements, for the reason that the cost of said improvements would be greatly in excess of the benefit thereof, and filed their said objections with said board; that said objections were disregarded.

That said board received bids as advertised and on April 4th, 1898, it accepted the bid of one John Moore to make said improvement of brick for the sum of $3.56 per lineal front foot on each side, and by ordinance directed the making of such improvement; that on the 30th day of April, said board entered into a written contract with said Moore to make said improvement for said sum of
80 $3.56 per lineal front foot on each side of the street, all as provided in the ordinance of February 23, 1898, and according to said plans and specifications; said contract also provided that said town of Irvington should be liable to said Moore "for the contract price of such improvement, whether represented by bonds or assessments, to the extent of the moneys actually received by said town from assessments or bonds growing out of said improvement, and also for the improvement of that part of said street which shall be occupied by the street and alley crossing, and for no more."

That on the 4th day of April, 1898, this cross-complainant commenced an action against the said town of Irvington, and asked for a permanent injunction against said town, restraining said town and its officers, board of trustees and agents from proceeding in any wise with the continuance or the construction of the improvement described in plaintiff's complaint; that on the 5th day of April, 1898, process in said action was duly served upon the president of said board of trustees of said town, that said action is still undetermined and pending in the superior court of Marion county, Indiana, being cause No. 56,585, room 2; that one of the reasons assigned why such injunction should be granted was that said improvement would amount to a confiscation of cross complainant's property, and was wholly void and without warrant of law.

That by reason of the above and other suits the said Moore refused to commence work on said contract and on the 22nd day of July, 1898, the plaintiff, William C. Smith, who was then and for more than six months prior to that time had been town civil engineer of Irvington, resigned as such engineer; that thereupon said Moore assigned the said contract to said Smith and said
81 town board accepted said assignment and released said Moore.

That on the 28th day of January, 1899, John V. Coyner as town civil engineer, submitted to said board a final estimate and made a report on said improvement, showing among other things the total cost thereof and the amount of the assessment against each abutting piece of property; that said report made a uniform assessment of $3.54 per lineal front foot on each side; that said board gave notice by publication that on the 15th day of February, 1899, a committee appointed by the said board would hear objections to such engineer's report; that on the 26th day of April, 1899, the said board after extending to property owners an opportunity to make objections to the said improvement in Washington street did by ordinance finally approve such engineer's report and confirm the assessment against each piece of abutting property, as made in said engineer's report, all in accordance with said resolution of February 23, 1898; that said assessments were made and confirmed at the uniform rate of $3.54 per lineal front foot; and such board did by such ordinance direct the town clerk to place said assessments upon the town tax duplicate and to charge the same respectively against the several lots and parcels of ground against which they were assessed; that said ordinance provided that all assessments not extended for payment in annual installments should be at once due and payable and should be collected by precept and sale as provided by law.

That on such hearing before said committee and on the hearing before said board of trustees no hearing was had upon and no consideration was given to the question of whether or not the abutting property or any part thereof was specially benefitted in an amount equal to, less than or in excess of the amounts fixed by the
82 assessments in the said engineer's report; that at no time did said committee or said board consider or determine or attempt

to consider or determine, or to give or have any hearing upon the amount of special benefits to any of the lands or to lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done and that said hearings before said committee and before said board were had and said assessments were made and confirmed upon the theory and belief that the statutes of the State and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board and the contract for said improvement, established the rule of assessment at the same fixed price per lineal front foot on each side of $3.54 for the whole improvement and that no change or alteration therein could be made by the board, that said committee and said board refused at such hearing to hear or consider any objection, or any evidence in support of any objection to said engineer's report and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any lot or parcel of land.

That all the members of the said board of trustees of said town of Irvington were residents of said town and tax payers thereof; that two members of said board to-wit:—Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at the said rate of $3.54 per lineal front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accuring to the real estate abutting upon such improvement.

That the total frontage of the cross-complainant's land upon said improvement was 1529.52 feet and that the said town clerk
83 in accordance with said ordinance placed upon the town tax duplicate an assessment against cross-complainant's said land of $3.54 per lineal front foot, making a total assessment of $5414.50. Said cross-complainant further says that the said contract so improved is of the aggregate length of five thousand, one hundred and twenty-six and fifteen hundredths (5126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1760 feet to the east line of said town of Irvington; that on the west side of said improvement the said Washington street is wholly unimproved for a distance of about 5115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the improved portion of Washington street is a portion out of what is known as the National road, which is a public highway extending from beyond the city of Indianapolis on the west through the country far to the east of said town of Irvington; that said highway is much used by the general public for travel and traffic from and to points east and west of said town of Irvington and that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington in going to and from the said town of Irvington; that but a small part of the travel over and along said improvement is to or from the property abutting thereon or by the owners thereof, that a large proportion of the real estate fronting on said improvement is unimproved, and is beyond the part of said town of

Irvington where real estate is being improved; and is beyond that part of said town where improvements are likely to be made and that there is no market for said real estate at this time and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved;
84 that the street improvements described in plaintiff's complaint added nothing to the value of a large and the greater part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said cross-complainant or to the other owners of the abutting property along the line thereof; that the said cross-complainant and the other owners of abutting property derived no more benefit from such improvement than the other residents and property owners of said town, and the general public throughout said county of Marion, that of the real estate belonging to this cross-complainant and described in plaintiff's complaint as follows, to-wit:—Lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University place, and more fully described as lots 53, 54, 55, 56, 57, 58, 59 and 60 in Pattison's University Place addition to the town of Irvington, Marion county, Indiana, are unimproved and unoccupied, that there is no sale or market for such lots at this time and there is no probability of there being in the near future any sale or market for said lots or any of them for improving or building purposes or for any purpose by which said improvement of Washington street would be of any advantage to or add to the value of said lots or any of them; that said improvement does not add to the value of said lots or of any of them; that said lots 53, 54, 55, 56, 57, 58 and 59 are of the value of $400.00 each; that the assessment against each of said lots is in substantial, to-wit:—$141.60, excess of the benefits received or which will be received by said lots, that said lot 60 is of the value of $300. and that the assessment against said lot 60 is in substantial, to-wit:—$327.45 excess of the benefits received or which will be received by said lot; that the land belonging to cross-complainant
85 and described in plaintiff's complaint as part W. ½ of S. W. ¼ sec. 3–15–4, and more fully described as a part of the west half of the south west quarter of section three (3), township fifteen (15) north, range four (4) east in Marion county, Indiana, is an irregular tract of 20.55 acres lying in the northwest part of the corporate limits of said town of Irvington, having a frontage of 1157.02 feet on the north side of Washington street and a depth of about 1237 feet; that said real estate is not platted into lots and that there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the said improvements of Washington street are on no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars, and that the assessment against said tract is in

substantial, to-wit:—$4095.84, excess of the benefits received or which will be received by said tract or any part thereof from said improvement.

The cross-complainant further alleges that by reason of the acts of said town board of trustees in passing said ordinances declaring the necessity for and providing for said improvement of Washington street and contracting therefor; and approving and confirming the engineer's report and the assessments made thereon on the 26th day of April, 1899, and by each and every act of said board connected with or relating to the said improvement, the defendant's prop-
86 erty is taken without compensation and without due process of law, and that all and each of the acts of said board is contrary to and in violation of the constitution and laws of the State of Indiana and contrary to and in violation of the Constitution of the United States and particularly of the first section of the fourteenth amendment to the Constitution and the assessment set out and described in plaintiff's complaint are illegal, null and void and are a cloud upon cross complainant's title to her said property.

That the Financial Exchange, Joseph H. Pattison, Elwood W. Seamans, and the Indiana Bermudez Asphalt Company claim some interest in the said assessments and are made parties hereto that they may answer as to such interest.

Wherefore the cross-complainant prays that the assessments against her said property may be declared illegal null and void, and that said assessments be adjudged to be cancelled and cross complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and The Indiana Bermudez Asphalt Company, and all persons claiming under or through them or any of them, be forever enjoined from attempting to collect or enforce said assessment, and for all other proper relief.

4" Par. X Comp.

Fourth paragraph. The defendant, Sarah A. Hibben, for her fourth and further paragraph of cross-complaint against the plaintiff, William H. Smith and against her co-defendants The Financial Exchange, Joseph Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company, says, that she is the owner of real estate abutting upon said improvement and having an aggregate frontage thereon of 1157.02 feet and described in plaintiff's complaint and in the assessment roll as "part W. ½ S. W. ¼ sec. 3–15–4." That
87 said real estate was assessed for said improvement at the uniform rate of $3.54 per lineal front foot making an aggregate assessment of $4095.85.

That the description of said real estate in the engineer's report and in the assessment therein made and in the assessment as approved and confirmed by the board of trustees of said town is as follows:

"*Estimated Roll, North Side.*"

* * * * * * *

No.	Owner's name.	No. of feet.	Description.	Assessment.
36	Sarah A. Hibben	1157.02	Part W. ½ S. W. ¼ sec. 3-15-4	$4095.85

That neither said engineer's report nor the assessment therein nor any of the proceedings or doings of the engineer of the said town of Irvington or of the board of trustees of said town or of any committee of said board contains any further or more complete description of said real estate.

That said assessment therein contained is illegal, null and void and a cloud upon cross-complainant's title to said real estate.

That the financial exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company claim some interest in the said assessment and are made parties hereto that they may answer as to such interest.

Wherefore, the cross-complainant prays that the assessment against her said property may be declared illegal null and void and that said assessment be adjudged to be cancelled and cross-complainant's title to said real estate be quieted and the plaintiff, William C. Smith, and the defendants, The Financial Exchange, Joseph H. Pattison, Elwood W. Seamans and the Indiana Bermudez Asphalt Company and all persons claiming under or through them or any of
88 them, be forever enjoined from attempting to collect or enforce said assessment and for all other proper relief.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
Att'ys for Sarah A. Hibben.

And afterwards, to-wit: on the 17th day of November, 1900, being the 12th judicial day of the November term, 1900, of said court, the following proceeding was had herein, viz:

Plaintiff files demurrer to the cross complaint herein, as follows:

Demurrer to Cross-comp. by Smith.

STATE OF INDIANA, } *ss:*
Marion County, }

In the Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Demurrer to Cross-complaint.

William C. Smith, plaintiff in the above entitled cause, and defendant named in the cross-complaint of Sarah A. Hibben herein

filed, demurs to each and every paragraph separately of the said cross-complaint and for a cause of demurrer says that neither of said paragraphs of cross-complaint states facts sufficient to constitute a cause of action against this defendant thereto.

Wherefore, he prays judgement.

HARVEY, PICKENS, COX & KAHN,
For Smith.

Memo.

See brief on dem. to ans.

H., P., C. & K.

Demurrer to Cross-comp. Sust.

And afterwards to-wit: on the 21st day of November, 1900, being the 15th judicial day of the November term 1900 of said court before the same hon. judge, the following proceedings were had herein, viz: "Come the parties by counsel, and the court, being fully advised in the premises, sustains the plaintiff's demurrer to the
89 cross-complaint of the defendant, Sarah A. Hibben, to which ruling said defendant, at the time excepts."

And now the defendants, Financial Exchange and Joseph H. Pattison each files demurrer to the cross-complaint of the defendant, Sarah A. Hibben, herein.

And now comes the defendant, Indiana Bermudez Asphalt Company, and files its disclaimer herein. Said demurrer and said disclaimer herein are in the words and figures following:"

Demurrer to Cross-Comp. by Financial Exchange & Pattison.

STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Demurrer to the Cross-complaint.

— the defendants, Financial Exchange, Joseph H. Pattison and separately demur to the cross-complaint of the defendant, Sarah A. Hibben, and for ground for demurrer, say that said cross complaint does not state facts sufficient to constitute a cause of action against either of said defendants.

AYRES, JONES & HOLLETT,
Att'ys for Defendants.

Disclaimer of Ind. Bermudez Asphalt Co.

STATE OF INDIANA, } ss:
County of Marion, }

In the Marion Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774. Disclaimer.
vs.
SARAH A. HIBBEN. }

The defendant, Indiana Bermudez Asphalt Company for separate answer to the cross complaint of the defendant, Sarah A. Hibben, says that it disclaims any interest in the matters in controversy herein and asks judgment for its costs.

AYRES, JONES & HOLLETT,
89½ *Att'ys for Indiana Bermudez Asphalt Company.*

And afterwards, to-wit: on the 2nd day of December, 1900, being the 9th judicial day of the December term 1900 of said court, before the same hon. judge, the following proceedings were had herein:

Demurrer of Pattison, Churchman, and Financial Exchange to Cross-comp. Sustained.

STATE OF INDIANA, } ss:
County of Marion, }

Superior Court, Room 3.

WILLIAM C. SMITH } No. 58774. Decree.
vs.
SARAH A. HIBBEN ET AL. }

Comes now the plaintiff by Harvey, Pickens, Cox & Kahn, his attorneys, and comes also the defendant, Sarah A. Hibben, by her attorneys, M. W. Hopkins and R. T. MacFall and come also the defendants, Joseph H. Pattision and William F. Churchman, partners trading as the Financial Exchange, by their attorneys, Ayres, Jones & Hollett, and the court sustains demurrer of Pattison and
90 Churchman and Financial Exchange to each paragraph of cross-complaint of defendant, Sarah A. Hibben, to which ruling defendant Hibben at the time excepts, and this cause is now dismissed by the plaintiff as to the defendant Elwood W. Seamans, and the defendant, Sarah A. Hibben also dismisses her cross-complaint as to said defendant, Elwood W. Seamans, and the plaintiff by leave of court dismisses his complaint as to the property next hereinafter described in so far as said complaint seeks to foreclose a lien thereon, to wit:—

All that part of the west half of the southwest quarter of sec. three (3) township fifteen (15) north, range four (4) east, fronting south on Washington street eleven hundred, fifty seven and two one hundreths (1157.02) feet, measuring east from a point — feet east of the west line of said quarter section and extending north one hundred fifty (150) feet, the entire length of said eleven hundred, fifty seven and two one hundredths (1157.02) feet.

And the defendant, Sarah A. Hibben, now by leave of court withdraws her first paragraph of answer in general denial heretofore filed in this cause and now in open court elects to stand by the answers to the complaint herein filed and by her cross-complaint herein filed and said defendant having declined, failed and refused to plead further to said complaint or by said cross complaint though by the court ruled so to do, the court renders judgment upon the complaint as upon default, upon the demurrers to the second, third and fourth paragraphs of answer of defendant, Sarah A. Hibben and upon the demurrers to the first, second, third and fourth paragraphs of the cross complaint of defendant, Sarah A. Hibben, and upon the said election and refusal of the said Sarah A. Hibben to plead further.

Decree.

Whereupon the court finds the allegations of said com-
91 plaint to be true in substance and in fact and that plaintiff should recover and have relief as therein prayed and as against the property hereinafter described.

It is therefore considered, ordered, adjudged and decreed by the court that the defendant, Sarah A. Hibben, take nothing by her cross-complaint, and that the plaintiff and the defendants, Joseph H. Pattison and William F. Churchman, recover of the defendant, Sarah A. Hibben, their costs and charges in behalf of said cross-complaint laid out and expended, to which judgment the defendant, Sarah A. Hibben, now excepts.

It is further considered, ordered, adjudged and decreed by the court that the plaintiff, William C. Smith, has a lien upon lots fifty-three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58) and fifty-nine (59) in Pattison's University place, an addition to the town of Irvington, in Marion county, in the State of Indiana, for the sum of one hundred, forty one dollars and sixty cents (141.60) upon each of said lots with interest thereon at the rate of 6% per annum, from the 28th day of January, 1899, making total on each of said lots to date hereof one hundred, fifty seven dollars and forty-six cents (157.46), principal and interest, and for the further sum of twenty-one dollars and forty-eight cents ($21.48) upon each of said lots as and for attorney's fees aggregating on each lot one hundred, seventy-eight dollars and ninety four cents (178.94); it is further ordered, adjudged and decreed that the plaintiff William C. Smith, has a lien upon lot 60 in said Pattison's University place, for the sum of three hundred, twenty seven dollars and forty five

cents ($327.45) with interest thereon at the rate of 6% per annum, from the 28th day of January, 1899, making the total
92 sum of three hundred sixty four dollars and twenty four cents ($364.24), principal and interest on said lot to date hereof, and for the further sum of forty nine dollars and sixty four cents ($49.64) as and for attorney's fees, aggregating on said lot four hundred, thirteen dollars and eighty eight — ($413.88), said aggregate amounts to bear interest from date hereof at the rate of 6% per annum.

That the costs of this action, accrued and to accrue, are a lien upon said lots in the follow proportion and are hereby apportioned among said lots in the following proportion, to-wit, a sixteen, one hundred and forty ninth (16/149) part of the costs upon each of said lots numbered fifty three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58) and fifty-nine (59) and a thirty-seven one hundred, forty ninth (37/149) part of the costs upon said lot numbered sixty (60).

That said liens are now due and unpaid and that the same be and hereby are foreclosed and all equities of redemption of the said defendant, Sarah A. Hibben, therein barred except as by law provided.

It is further considered, ordered, adjudged and decreed that the defendant, Sarah A. Hibben, or any one in her behalf, may discharge said liens or any of them before sale as herein ordered by paying to the clerk of this court the amount of the assessment, interest, attorney's fees and costs herein adjudged, decreed and apportioned against such lot; and in the event that said liens or any of them shall be so discharged said clerk shall make distribution in the same manner as hereinafter ordered, provided, that after the payment of costs as herein ordered, the clerk shall deduct from the amount coming into his hands the portion thereof paid as at-
93 torney's fees and interest thereon, which portion shall be paid by him to the plaintiff's attorneys as herein adjudged and pay the balance to Pattison and Churchman or to plaintiff as hereinafter ordered

That said lots and each of them be sold separately by the sheriff of Marion county, Indiana, by virtue of a certified copy hereof duly issued to him, as other lands are sold upon execution in the State of Indiana.

That the proceeds of such sales of each lot, not exceeding in the aggregate the total amount of the assessment interest, attorney's fees and costs hereinbefore adjudged, decreed and apportioned against such lot be applied by said sheriff as follows:

First. To the payment of the part of the costs accrued and to accrue apportioned to such lot.

Second. To the payment to plaintiff's attorneys of the amount of attorney's fees as hereinbefore found, adjudged and apportioned to such lot and interest thereon at the rate of 6% per annum from date of this judgment.

Third. By the payment to the clerk of this court of any balance

of the above described proceeds to be by said clerk paid to the defendants, Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, provided that when such payments to such partners shall amount to the sum of nine thousand, three hundred, eighty-seven dollars and sixteen cents ($9,387.16) with interest thereon at the rate of 8 % per annum. from November 2d, 1900, and the further sum of one thousand, six hundred, ten dollars and seventy-nine cents ($1,610.79) without interest, or when the said defendants trading as the Financial Exchange shall have receipted to said clerk for the full amount of their said above described claim,
said clerk shall pay such balances over to the said plaintiff,
94 William C. Smith, or his attorney of record.

Fourth. In the event that any lot shall sell for a sum in excess of the assessment, interest, attorney's fees and costs, hereinbefore adjudged and apportioned against such lot, such excess or excesses shall be paid by the sheriff to the defendant, Sarah A. Hibben.

All of which is finally considered, ordered, decreed and adjudged by the court. To all of which the defendant, Sarah A. Hibben, now excepts.

And afterwards to-wit: on the 22nd day of December, 1900, being the 18th judicial day of the said December term 1900 of said court, before the same hon. judge, the following proceedings were had herein; "Comes the defendant, Sarah A. Hibben, by counsel, and prays an appeal of this cause to the supreme court of Indiana, which is granted upon said defendant filing an appeal bond herein in the sum of five hundred dollars ($500.00) within ten (10) days from this date. And now the said defendant files an appeal bond herein and the same is approved by the court and is as follows:

Appeal Prayed, Granted, Bond Filed.

Know all men by these presents, that we, Sarah A. Hibben as principal and Thos. E. Hibben as surety hereon, are held and firmly bound unto William C. Smith, Joseph H. Pattison and William F. Churchman, in the principal sum of five hundred dollars ($500), to the payment of which well and truly to be made and done we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of December, 1900.

The condition of the above obligation is such, that whereas heretofore to-wit: on the 12th day of December, 1900, the said William
C. Smith, Joseph H. Pattison and William F. Churchman in
95 room 3 of the superior court of Marion county in the State of
Indiana in cause No. 58774, recovered a judgment against the said Sarah A. Hibben for the foreclosure of a lien upon lots fifty three (53), fifty-four (54), fifty-five (55), fifty-six (56), fifty-seven (57), fifty-eight (58), fifty-nine (59) and sixty (60) in Pattison's University place, an addition to the town of Irvington, Marion county, in the

State of Indiana, said lien being for the amount of a certain street assessment, with interest, attorney's fees and costs, from which said judgment of said superior court the said Sarah A. Hibben has appealed to the supreme court of Indiana.

Now if the said Sarah A. Hibben shall well and truly prosecute said appeal and abide by and pay the judgment and costs which may be rendered or affirmed against her, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

SARAH A. HIBBEN.
THOS. E. HIBBEN.

Approved this 22nd day of December, 1900.

VINSON CARTER,
Judge of the Superior Court of Marion County, Room 3.

STATE OF INDIANA, } ss:
County of Marion, }

Thomas E. Hibben, being first duly sworn upon his oath, says that he is the owner of unincumbered real estate in Marion county, in the State of Indiana, exceeding in value five thousand dollars and that he makes this affidavit to induce the court to accept the above bond.

THOS. E. HIBBEN.

Subscribed and sworn to before the undersigned, this 18th day of December, 1900.

96

[SEAL.]

CHAS. H. SMITH,
Notary Public.

On January 12th, 1901, the following precipe was duly entered in the "Precipe Book" of the county clerk's office Marion county, Indiana.

Præcipe.

STATE OF INDIANA, } ss:
County of Marion, }

In the Superior Court, Room 3.

WILLIAM C. SMITH
vs.
SARAH A. HIBBEN ET AL. } No. 58774. Præcipe.

To the clerk of the superior court of Marion county, Indiana:

The defendant, Sarah A. Hibben, requests you to prepare and properly certify for use on appeal to the supreme court of Indiana a

transcript of all papers filed in said cause and all orders and rulings and the judgement therein rendered.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
Attorneys for Defendant, Sarah A. Hibben.

STATE OF INDIANA, } ss :
County of Marion, }

I, George B. Elliott, clerk of the superior court within and for the county aforesaid, do hereby certify that the foregoing transcript contains full, true and complete copies of all the entries of proceedings had and of papers filed in said superior court in cause numbered 58,774 as appear from the records and files thereof, now in my custody and keeping.

In testimony whereof, I hereunto subscribe my name and affix the seal of said superior court at my office in the city of Indianapolis the 15th day of January, A. D. 1901.

97 [SEAL.] GEORGE B. ELLIOTT, *Clerk.*

STATE OF INDIANA :

In the Supreme Court.

SARAH A. HIBBEN, Appellant,
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; Financial Exchange, and Joseph H. Pattison, Appellees.

No. 19564. Assignment of Errors. Filed Jan. 28, 1901. R. A. Brown, Clerk.

The appellant, Sarah A. Hibben, says there is manifest error in the judgement and proceedings in this cause in this :—

First. The court erred in overruling appellant's demurrer to the complaint of appellee, William C. Smith.

Second. The court erred in sustaining the demurrers of appellee, William C. Smith, to the second, third and fourth paragraphs of appellant's answer and each of them.

Third. The court erred in sustaining the demurrers of the appellee, William C. Smith, to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Fourth. The court erred in sustaining the demurrer of the appellees, The Financial Exchange and Joseph H. Pattison to appellant's cross-complaint.

Fifth. The court erred in sustaining the demurrers of the appellees, The Financial Exchange and Joseph H. Pattison to the
98 first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Sixth. The court erred in sustaining the demurrers of appellee, The Financial Exchange to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Seventh. The court erred in sustaining the demurrers of appellee, Joseph H. Pattison to the first, second, third and fourth paragraphs of appellant's cross-complaint, and each of them.

Wherefore appellant prays that the judgement be reversed.

MURAT W. HOPKINS,
RUSSELL F. MacFALL,
Attorneys for Appellant.

99 And afterwards, to-wit: on the 27th day of February, 1901, the same being the 81st judicial day of the November term, 1900, of said supreme court, the following further pleas and proceedings were had in said cause to-wit:

Come now the parties, by their counsel, and this cause is submitted to the court for judgment and decree as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said supreme court adopted in relation thereto.

And afterwards, to-wit: on the 27th day of April 1901, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her brief, in the words and figures following: (Here insert.)

And comes now the appellant, by counsel, and files a petition for oral argument, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 23rd day of May, 1901, the following further pleas and proceedings were had herein:

Comes now the appellees, by counsel, and file their petition for extension of time in which to file brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 28th day of May, 1901, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, the appellees' petition for an extension of time is granted and fifteen days' additional time given.

100 And afterwards, to-wit: on the 12th day of June, 1901 the following further pleas and proceedings were had herein:

Come now the appellees, by their counsel, and file their brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 27th day of June, 1901, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her reply brief, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 7th day of December, 1901, the following further pleas and proceedings were had herein:

Come now the appellees, by counsel, and file petition to fix date for oral argument, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 12th day of December, 1901, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, sets said cause for oral argument on December 19, 1901, and notices thereof are duly issued.

And afterwards, to-wit: on the 9th day of January, 1902, the same being the 40th judicial day of the November term, 1901, of said court, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being sufficiently advised in the premises, now *affirms* the decision and judgment of the court below in the above entitled cause, with an opinion pronounced by Jordan, C. J., in the words and figures following:

101 JORDAN, *C. J.*:

This action was instituted by appellee in the lower court to enforce an assessment lien against certain lots of real estate owned by appellant, and situated in the incorporated town of Irvington, Marion county, Ind. The assessment in question is for the improvement of Washington street, in said town. A demurrer by appellant to the complaint was overruled, and she filed an answer in five paragraphs, the first of which was a general denial, which was subsequently withdrawn. The fifth paragraph of her answer was addressed to so much of the complaint as sought to enforce the lien against certain unplatted land. Appellant also filed a cross complaint, in four paragraphs whereof she sought to have the assessment in controversy declared illegal and void, and her title to the realty, as against the lien thereunder quieted. The fifth paragraph of the cross complaint was addressed only to the unplatted land. A demurrer to the second, third, and fourth paragraphs of the answer was sustained, and overruled as to the fifth paragraph. A demurrer to each paragraph of the cross complaint was also sustained. Appellee dismissed so much of his complaint as sought to enforce the lien against the unplatted real estate. Having withdrawn her denial, appellant elected to stand by her answer and cross complaint; and, on her refusal to further plead, the court rendered its judgment foreclosing the assessment lien, and decreed a sale of each of the lots in satisfaction of the lien thereon. From this judgment appellant appeals, and predicates her errors on the court's ruling on the demurrers to the several pleadings, as previously mentioned.

The constitutionality of the street improvement statute known as the "Barrett law," under which the street was improved, is called

in question and fully discussed by counsel for appellant. This litigation arises out of the same street improvement involved in the appeal of Shank *v.* Smith (at last term) 61 N. E. 932; and the questions, in the main, are the same as were presented and reviewed in that appeal, and decided adversely to the contention of appellant. Upon the authority of that decision, her claim in this case in respect to the principal points upon which she relies for a reversal must be denied. The validity of the Barrett law has been repeatedly sustained by this court, and must be considered as no longer an open question. Leeds *v.* De Frees (at last term) 61 N. E. 930. In the latter case, in speaking of the hearing which the statute accorded to property owners in regard to assessments made against their property, we said: "The statute in question, as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled
102 that, when a general power is granted by a statute, every necessary power for the effectual exercise thereof is given by implication. (Citing authorities.) Possessing such general power under the statute, the council certainly had the right upon a hearing to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property according to the benefits resulting to each on account of the improvement. It is true that the statute provides what may be considered as *prima facie* evidence of the benefits received by abutting property, but such standard or evidence is not conclusive, as the council has the right to so apportion the cost as to make it conform to the benefits derived." In the case at bar no facts are disclosed by the record to establish that the action or proceedings of the board of trustees of the town of Irvington in making the improvement and assessment in controversy are void. It is fully disclosed that under the law the board had and retained complete jurisdiction over the subject-matter, and was invested with the authority and power to make the improvement; and by virtue of the steps taken and the notices given the board also acquired jurisdiction over the person of the appellant, an abutting property owner, and thereby had the power and authority to subject her said property to an assessment of such benefits as were derived by it by virtue of the improvement in controversy. Possessing the power to hear and determine under the statute in regard to the amount that ought to be assessed against appellant's property as benefits derived by reason of the improvement, the fact that the board through its misinterpretation of the law or otherwise, may have decided erroneously in regard to that question, will not suffice to expose its judgment to the collateral attack which appellant seeks under her pleadings to make; for the rule is well settled in such cases that, where a tribunal is invested with the power to decide in a matter, such authority carries with it, by neces-

sary implication, the power to decide wrong as well as right. Board *v.* Markle, 46 Ind. 96. So long as the board of trustees keeps within the limits of its jurisdiction, its decision or judgment in the premises must be held to be binding and conclusive on all persons concerned until set aside or annulled by some direct proceeding known to the law, based on reasons or grounds which the law recognizes as sufficient for that purpose. City of Ft. Wayne *v.* Cody, 43 Ind. 197; Anderson *v.* Baker, 98 Ind. 587; Sunier *v.* Miller, 105 Ind. 393, 4 N. E. 867; Garvin *v.* Daussman, 114 Ind. 429, 16 N. E. 826, 5 Am. St. Rep. 637; Motz *v.* City of Detroit, 18 Mich. 495; Harman *v.* Moore, 112 Ind. 227, 13 N. E. 718; School Tp. *v.* Irwin, 150 Ind. 12, 49 N. E. 806; Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082; Black, 103 Judgm. §§ 290, 291. The doctrine seems to be well settled that in order to render a judgment of a court or other tribunal invested with the power to decide in a matter void, so as to open such judgment to a collateral attack, an absence must be shown of either—First, a legal organization of the tribunal; or, second, jurisdiction over the subject-matter; or, third, jurisdiction over the person; or, fourth, one or more of these matters must appear to have been lost after it or they once existed. Van Fleet, Coll. Attack, § 16.

It was the duty of the board to accord appellant, as a property owner affected by the assessment, a hearing as contemplated by the statute, and upon its refusal to do so the law afforded her an adequate remedy for coercing the board to grant her such right. Shank *v.* Smith, *supra*. The fact that the board may have declined to award her a hearing, or refused to receive and consider the facts or evidence which she offered for the purpose of rebutting the *prima facie* test or standard which the statute provided for the measurement, in the first instance, of the benefits to her property, would not open the door to a collateral assault on its judgment. The defense which appellant sought to make against the enforcement of the assessment, and the relief which she sought to obtain under the facts alleged in the first, second, third, and fourth paragraphs of her cross complaint, were nothing more than a collateral attack on the judgment of the board. When sections 3 and 7 of the Barrett law (sections 4290, 4294, Burns' Ann. St., 1894) are construed in connection with each other, it is manifest that the assessment levied by a board of trustees or by a common council of a city, as the case may be, for the improvements authorized by the statute, together with the interest accruing after such assessment is made, becomes a lien, to the extent of a tax lien, from the time or date at which the improvement or work was ordered. The power and duty of the board of trustees or common council, as the case may be, under the statute, to make an assessment for such improvements, continue in that tribunal until legally exercised. While it is true that a void assessment may be defeated or set aside and held for naught in a collateral action, still, under such circumstances, if the principal proceedings of the board upon which an assessment must rest are not also void, a valid reassessment may be made, by which the objectionable matters or grounds which resulted in rendering the first assessment

invalid may be avoided. Consequently, while an invalid assessment may be set aside, or its enforcement defeated, still the court, under its judgment, in so doing, would not be authorized thereby to impose or destroy the lien arising out of a subsequent reassessment; and such lien, as previously stated, would attach to the property as of the date when the improvement in question was ordered to be made. Balfe *v.* Johnson, 40 Ind., 235; Ball *v.* Balfe, 41 Ind., 221; Reeves *v.* Grottendick, 131 Ind., 107, 30 N. E. 889; Sands *v.* Hatfield, 7 Ind. App., 357, 34 N. E. 654; Becker *v.* Railway Co., 17 Ind. App., 324, 46 N. E. 685; Wats. St. Liens, § 1224.

We have examined and fully considered all of the questions discussed by appellant's learned counsel, but discover nothing in the record to justify a reversal. The judgment is therefore affirmed. All concur, except Baker, J., not participating.

It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things affirmed at the cost of the appellant, all of which is ordered to be certified to said court.

And it is further considered by the court, that the appellees recover of the appellant the sum of — for their costs and charges in this behalf expended.

104 And afterwards, to-wit: on the 8th day of March, 1902, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files her petition for a rehearing and brief thereon, in the words and figures following: (Here insert.)

And afterwards, to-wit: on the 13th day of March, 1902, the following further pleas and proceedings were had herein:

Come now the appellees, by counsel, and file their brief on the petition for a rehearing, in the words and figures following; (Here insert.)

And afterwards, to-wit: on the 14th day of March, 1902, the following further pleas and proceedings were had herein:

Come now the parties, by counsel, and the court being fully advised in the premises, overrules the petition for a rehearing heretofore filed by appellant.

105 And afterwards, to-wit: on the 2nd day of May, 1902, the same being the 137th judicial day of the May term, 1902, of said supreme court of the State of Indiana, the following further pleas and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the clerk of the supreme court, her petition for an allowance of a writ of error, said petition being next below attached:

105½ In the Supreme Court of Indiana.

SARAH A. HIBBEN
v.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison.

Petition for Allowance of Writ of Error to Supreme Court of Indiana.

The petition of Sarah A. Hibben respectfully shows that on the ninth day of January, A. D., 1902, the supreme court of Indiana, rendered a judgment against your petitioner in a certain cause wherein your petitioner was appellant and William C. Smith, Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison were appellees; and that on the fourteenth day of March, 1902, the said supreme court of Indiana overruled your petitioner's petition for a rehearing in said cause; that said judgment affirmed a judgment and a decree rendered against your petitioner by the superior court of Marion county, Indiana, in a cause wherein said William C. Smith was plaintiff and your petitioner together with said Joseph H. Pattison and William F. Churchman, partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison were defendants, and that said decree directed the sale of certain real estate belonging to your petitioner to satisfy certain street improvement liens amounting with principal, interest and attorneys' fees to an aggregate of one thousand, six hundred, sixty-six and $\frac{46}{100}$ dollars, with interest at six per cent. thereon from the twelfth day of December, 1900, and that said decree awarded
106 order of sale thereon, as will appear by reference to the record and proceedings in said cause, and that said supreme court of Indiana is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States, by writ of error, under the statute of the United States authorizing writs of error to State courts being section 709 of the Revised Statutes of the United States, because on the hearing and trial before said superior court of Marion county and also on said hearing before said supreme court of Indiana your petitioner contended and claimed that the statutes of the State of Indiana, the ordinances, acts and proceedings of the town board of trustees, which authorized and directed the making of the street improvement for which such assessment liens were levied, and also the said assessment liens, were each and all, null, void, invalid and of no force and effect for the reason that they and each of them failed to afford to your petitioner due process of law and that each and all were contrary to and in violation of the Constitution of the United States and particularly of section 1 of the fourteenth amendment to the Constitution of the United States;

that said superior court of Marion county and said supreme court of Indiana decided that the said statutes of the State of Indiana and the said ordinances, acts and proceedings of the said town board of trustees and the said assessments and the liens thereof and each and all of them were valid and did afford your petitioner due process of law and were not contrary to or in violation of the said Constitution of the United States.

Your petitioner further alleges that the said statutes of the State of Indiana approved March 8th, 1899, being sections 4238 to 4299, both inclusive of Burn's Revised Statutes of 1894; and that all the acts, ordinances and proceedings of the town board of trustees
107 of the town of Irvington in reference to the making of the assessments upon which said judgment and decree was rendered and the said assessments and the liens thereof, are null, void, invalid and of no effect for the reason that all and each of them fail to afford to your petitioner due process of law and all and each are opposed to and contrary to the Constitution of the United States, and particularly to section 1 of the fourteenth amendment to the Constitution of the United States, all of which appears by the record of the proceedings in said cause, and in the assignment of errors which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will ever pray for the correction of errors so complained of and for a reversal of said judgment and decree.

Dated at Indianapolis, Indiana, May 2, 1902.

SARAH A. HIBBEN, *Petitioner.*
MURAT W. HOPKINS,
RUSSELL T. MACFALL,
Attorneys for Petitioner.

Granted by the court this May 2d 1902.

JAS. H. JORDAN,
Chief Justice Supreme Court of Indiana.

108 [Endorsed:] 19564 Sarah A. Hibben *vs.* William C. Smith *et al.* Petition for allowance of writ of error Murat W. Hopkins, attorney, 1202–5–16 Stevenson building, Indianapolis, Ind. Filed May 2 1902 R. A. Brown, clerk.

109 And on the same day came again the said appellant, by counsel, and filed in the office of the clerk of said supreme court, a writ of error from the Supreme Court of the United States, to the said supreme court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

110 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said supreme court, before you, between Sarah A. Hibben and William C. Smith, Joseph H. Pattison, & William F. Churchman partners trading as the Financial Exchange, The Financial Exchange and Joseph H. Pattison a manifest error hath happened to the great damage of the said Sarah A. Hibben as by her complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington thirty days after the date hereof, in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 2d day of May A. D. 1902.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk*.

[Endorsed:] Filed May 2 1902 R. A. Brown clerk.

111 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, its bond on appeal, in the penal sum of four thousand ($4,000) dollars, which said bond is now taken and approved and is hereto next below attached:

112 In the Supreme Court of the United States.

SARAH A. HIBBEN
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and WILLIAM F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison. } No. —.

Know all men by these presents, that we Sarah A. Hibben, Harold B. Hibben and Thomas E. Hibben are held and firmly bound unto the above named William C. Smith Joseph H. Pattison and William

F. Churchman partners trading as the Financial Exchange, the Financial Exchange, and Joseph H. Pattison in the sum of four thousand dollars to be paid to said obligees to which payment, well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors and administrators, jointly by these presents.

Sealed with our seals and dated this 2nd day of May 1902.

113 Whereas, the above named Sarah A. Hibben hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the supreme court of Indiana: Now, therefore, the condition of this obligation is, that if the above named Sarah A. Hibben shall prosecute her said writ of error to effect and answer all costs and damages that may be adjudged or awarded against her if she shall fail to make good her plea, then this obligation to be void; otherwise in full force.

SARAH A. HIBBEN. [SEAL.]
HAROLD B. HIBBEN. [SEAL.]
THOS. E. HIBBEN. [SEAL.]

Sealed and delivered in presence of—
MURAT W. HOPKINS.

Taken and approved by me this 2 day of May 1902.
JAS. H. JORDAN,
C. J. Supreme Court of Indiana.

STATE OF INDIANA, *Marion County,* } *ss:*

Harold B. Hibben and Thomas E. Hibben, being both duly sworn upon their several oaths, say that they are each the owner of unencumbered real estate in Marion county, in the State of Indiana, worth to exceed five thousand dollars ($5,000.00).

HAROLD B. HIBBEN.
THOS. E. HIBBEN.

Subscribed and sworn to before me this the 2nd day of May, 1902. Commission expires Dec. 16th 1903.

[Seal Notary Public, State of Indiana.]

MURAT W. HOPKINS,
Notary Public.

Filed May 2 1902.

R. A. BROWN, *Clerk.*

114 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, the citation on said writ of error, duly signed by Hon. James H. Jordan, chief justice of this court, and proof of service of the citation on the

defendants in error, said citation and proof of service thereof being hereto next below attached and being as follows:

115 UNITED STATES OF AMERICA, ss:

The President of the United States to William C. Smith, Joseph H. Pattison, and William F. Churchman, partners trading as the Financial Exchange; the Financial Exchange, and Joseph H. Pattison, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the city of Washington on the 1st day of June next, 1902 pursuant to an order allowing an appeal entered in the clerk's office of the supreme court of the State of Indiana in that certain action numbered 19564, in which Sarah A. Hibben is appellant and you are appellee, to show cause, if any there be why the judgment and decree rendered against the said appellant, as in the said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Jordan, chief justice of the supreme court of Indiana.

This the 2nd day of May, 1902.

JAS. H. JORDAN,
Chief Justice Supreme Court of Indiana.

Filed May 13 1902

R. A. BROWN, *Clerk.*

UNITED STATES OF AMERICA, }
District of Indiana. }

I received this writ at Indianapolis May 9, 1902 at 4 o'clock p. m., and served the same as follows: Upon William C. Smith and Joseph H. Pattison, by reading to, in the hearing of, and by delivering a copy of this writ to each of them. Upon the Financial Exchange by reading to, in the hearing of, and by delivering a copy of this writ to each William F. Churchman and Joseph H. Pattison, partners in the said Financial Exchange, at Indianapolis May 10, 1902

HENRY C. PETTIT,
U. S. Marshal, District of Indiana,
By ALONZO BOYD, *Deputy.*

Marshal's costs $8.25.

116 [Endorsed:] Filed May 2 1902 R. A. Brown, clerk.

117 And on the same day came again the appellant, by counsel, and filed in the office of the clerk of said supreme court, an assignment of errors in the Supreme Court of the United States, on

the writ of error herein, said assignment of errors being hereto next below attached, and being as follows:

118 In the Supreme Court of the United States.

SARAH A. HIBBEN
v.
WILLIAM C. SMITH, JOSEPH H. PATTISON, and William F. Churchman, Partners Trading as the Financial Exchange; The Financial Exchange, Joseph H. Pattison. } Assignment of Errors.

On writ of error to the supreme court of Indiana.

The appellant in this action in connection with her petition for a writ of error, makes the following assignment of errors which she avers occurred in the proceedings on the hearing and determination of said cause in the supreme court of Indiana, to-wit:—

First. The supreme court of Indiana erred in affirming the judgment and decree of the superior court of Marion county, Indiana.

Second. The supreme court of Indiana erred in overruling appellant's petition for a rehearing.

Third. The supreme court of Indiana erred in holding that the act of the General Assembly of the State of Indiana approved March 8, 1889, being chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889, at page 237, and all acts amendatory thereof being sections 4238 to 4299, both inclusive, of Burns' Revision of the Statutes of Indiana of 1894, afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fourth. That the supreme court of Indiana erred in holding that the ordinances, acts and proceedings of the town board of trustees of the town of Irvington afforded to appellant due
119 process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fifth. The supreme court of Indiana erred in holding that the assessments upon appellant's lots were levied by due process of law, as guaranteed by the Constitution of the United States.

Sixth. The supreme court of Indiana erred in holding, that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the refusal of such board *of such board* of town trustees to give to appellant a hearing upon the amount of special benefits accruing to her lots and its refusal to permit appellant to introduce evidence as to the amount of actual special benefits accruing to her lots, did not deny to ap-

pellant due process of law, as guaranteed by the Constitution of the United States.

Seventh. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, sustaining the demurrer of said William C. Smith to the third and fourth paragraphs of appellant's answer and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of answer and of cross-complaint, which paragraphs of answer and of cross-complaint, each, alleged that the acts, ordinances and proceedings of the said board of town trustees, and the said assessments made by said board of trustees did not afford appellant due process of law as guaranteed by the Constitution of the United States for the reason that said board of trustees refused to give to appellant a hearing upon the question of the amount of actual special benefits accruing to her said lots and refused to hear or permit appellant to introduce evidence as to the amount of actual special benefits accruing to her said lots.

120 Eighth. The supreme court of Indiana erred in holding that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the assessment and apportionment of actual special benefits upon appellant's lots by a town board of trustees, all of the five members of which were residents and tax payers of the town and two of the members of which owned lots and lands abutting upon the same improvement and at the same time assessed therefor by said board, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Ninth. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the third and fourth paragraphs of appellant's answers and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of said answer and said cross-complaint, which paragraphs of answer and of cross-complaint, each alleged that the acts, ordinances and proceedings of said board of town trustees, and the assessments made by said board of town trustees did not afford to appellant due process of law as guaranteed by the Constitution of the United States for the reason that all of the five members of the board of town trustees which fixed and levied the assessments of actual special benefits upon appellant's lots were residents and tax payers of said town, and that two of said members owned lands and lots abutting upon the same improvement, and at the same time assessed therefor by said board.

Tenth. The supreme court of Indiana erred in holding that a State law which requires assessments for street improvements to be apportioned upon the basis of the actual special benefits, and

121 which provides no method by which such benefits could or might be judicially fixed or determined, afforded to appellant

due process of law, as guaranteed by the Constitution of the United States.

Eleventh. The supreme court of Indiana erred in holding that the arbitrary levy for a street improvement of an assessment in substantial excess of the actual special benefits, which levy was not made according to any prescribed or recognized statutory method, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Twelfth. The supreme court of Indiana erred in affirming the ruling and judgment of the superior court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the fourth paragraph of appellant's answer and the second and third paragraphs of appellant's cross-complaint, which paragraphs of answer and cross-complaint each alleged that the assessments against appellant's lots and each of them were not made and levied by due process of law, as guaranteed by the Constitution of the United States for the reason that said assessments and each of them were in substantial excess of the actual special benefits accruing therefrom, and that said assessments were not made and levied according to any prescribed or recognized statutory method.

Dated at Indianapolis, Indiana, May 2, 1902.

SARAH A. HIBBEN, *Petitioner.*
MURAT W. HOPKINS,
RUSSELL T. MACFALL,
Attorneys for Petitioners.

122 [Endorsed:] Supreme Court of United States Sarah A. Hibben *vs.* William C. Smith *et al.* Assignment of errors Filed May 2 1902 R. A. Brown clerk Murat W. Hopkins, attorney, 1202–5–16 Stevenson building, Indianapolis, Ind.

123 I, Robert A. Brown, clerk of the supreme court of the State of Indiana, certify the above and foregoing to be a full, true and complete transcript of the record and proceedings had, papers filed, motions decided, rulings made, opinions delivered, judgments rendered, and all decrees and orders entered in the supreme court of Indiana, in the above entitled cause; also the original writ of error from the Supreme Court of the United States to the supreme court of Indiana in this cause, and the original citation to the defendant in error and proof of service thereof and the original assignment of errors in the Supreme Court of the United States on said writ of error, and the original cost bond.

Which said transcript, annexed hereto, together with said original writ of error, original citation, original assignment of error and original cost bond, I hereby certify as and for my full return to said writ of error.

In witness whereof, I hereto set my hand and affix the seal of said supreme court, at the city of Indianapolis, Indiana, this 17th day of May, 1902.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROB'T A. BROWN,
Clerk Supreme Court of Indiana.

Endorsed on cover: File No. 18548. Indiana supreme court. Term No. 59. Sarah A. Hibben, plaintiff in error, *vs.* William C. Smith, Joseph H. Pattison, & William F. Churchman, partners trading as the Financial Exchange; The Financial Exchange, & Joseph H. Pattison. Filed May 31st, 1902.

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(18543)

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN,
Plaintiff in Error,
vs.
WILLIAM C. SMITH, JOSEPH H. PATTISON AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE AND JOSEPH H. PATTISON,
Defendants in Error.

IN ERROR to the Supreme Court of the State of Indiana.

BRIEF FOR PLAINTIFF IN ERROR.

MURAT W. HOPKINS,
RUSSELL T. MacFALL,
MERRILL MOORTS,
Solicitors and Counsel for Plaintiff in Error.

INDEX.

	Pages.
Statement of Case	1–8
Complaint	2
Answer, Second Paragraph, and demurrer	3
Answer, Third Paragraph, and demurrer	3–4
Answer, Fourth Paragraph, and demurrer	4–7
Cross-complaints and demurrers	7–8
Judgment	8
Appeal to State Supreme Court	8
Ruling of State Supreme Court	8
Errors Relied Upon	8–12
Brief of Argument	13–76
Indiana Statute	14
Points for Argument and Authorities	15–22
Argument	23–76
Indiana Rule of Special Assessments	23–26
The Assessment, a Judicial Function	26–33
Arbitrary Assessment Not Due Process of Law	33–51
Due Process of Law	35
Controls Taxing Power	41–48
Town Board Not Judicial Body	48
Other Assessments in Indiana	49
Judges Disqualified by Interest	51–76
Maxims	52
Interest of Town Board	57
Interest Disqualifies	58–67
Tax Payers Disqualified	68
Jurors Disqualified	69
Necessity Not Sufficient	71
Waiver and Collateral Attack	72
Summary	75
Table of Cases	77
Appendix	i

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This case was orignally brought in the Superior Court of Marion County, Indiana, by William C. Smith to enforce upon eight lots and a part of an unplatted tract of twenty acres of land belonging to plaintiff in error, the lien of an assessment for the improvement of the roadway of Washington street, in the Town of Irvington, Indiana.

The complaint (Rec., p. 1) was in the usual form, and included as an exhibit a part of the Town Engineer's estimate roll, from which it appeared that the benefits had been estimated by the engineer, and assessed by the town board at a uniform rate of $3.54 per foot fronting on the improvement. A demurrer to the complaint by plaintiff in error was overruled. (Rec., p. 5.) This ruling was the first error assigned in the State Supreme Court. (Rec., p. 61.)

Answer was then filed. The second paragraph of answer (Rec., p. 6) alleged that the improvement was made and the lien sought to be enforced in accordance with the provisions of an act of the General Assembly of the State of Indiana, approved March 8th, 1889, and amendments thereto, being Sections 4288 to 4299, both inclusive, of the Revised Statutes of 1894, and also alleged that said acts and each section thereof were null and void because contrary to the Fourteenth Amendment to the Constitution of the United States. The trial court sustained a demurrer to this paragraph of answer (Rec., p. 32), and this was included in the second assignment of error in the State Supreme Court. (Rec., p. 61.)

The third paragraph of answer (Rec., p. 7) set out verbatim all the ordinances and proceedings of the Board of Town Trustees relating to the improvement, viz.: The resolution declaring the necessity for the improvement, and directing the making of the same (Rec., pp. 7, 35); the resolution accepting the bid (Rec., pp. 11, 37); the contract and bond (Rec., pp. 12, 38); the report and estimate of the Town Engineer (Rec., pp. 19, 43); the final substituted report of the committee on streets to which was referred the Engineer's report and estimate (Rec., pp. 23, 45); the final assessment by the Board of Town Trustees (Rec., pp. 25, 46).

It is also alleged (Rec. pp. 24. 46); "That on such hearing before said committee on streets, alleys and contracts, and on the hearing before said Board of Trustees, no hearing was had upon, and no consideration was given, to the question of

whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less than, or in excess of the amounts fixed by the assessments in said engineer's report; that at no time did said committee or said board consider or determine, or attempt to consider or determine, or to give or have any hearing upon the amount of special benefit to any of the lands or lots abutting upon said improvement; that all the acts and proceedings of said board hereinbefore set out were had and done, and that said hearings before said committee and before said board were had, and said assessments were made and confirmed upon the theory and belief on the part of said board and of the members thereof that the statutes of the state and the said ordinance and resolution of February 23, 1898, and the subsequent ordinances of said board, and the contract for said improvement established the rule for assessments at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by said board; that said committee and said board refused at such hearing to hear or consider any objection to said engineer's report, and the assessments therein, based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land."

"That said substitute report (Rec. pp. 23, 45) was adopted and that thereupon on the said 26th day of April, 1899, the said board, by ordinance, accepted said improvement and adopted and approved such engineer's report, and approved and confirmed the assessments set forth in such engineer's report, which approval and confirmation was in the words and figures following, to-wit:" (See Rec., pp. 25, 46.)

It also alleged (Rec., pp. 26, 28, 47, 51) "that all the members of said board of trustees of said Town of Irvington were residents of said town and taxpayers thereof; that two members of said board, towit: Hilton U. Brown and J. C. Barnhill were the owners of lots abutting upon said improvement and assessed therefor at said rate of $3.54 per lineal

front foot, and by reason of such interest were not competent to fix and determine the amount of actual special benefits accruing to the real estate abutting upon such improvement."

It further alleged (Rec., pp. 26, 30, 48, 50) that plaintiff in error brought action to enjoin the making of the improvement on the same day the contract therefor was awarded for the reason that said improvement would confiscate said property, and that said action is still pending.

It further alleged (Rec., p. 26) that all the said acts, ordinances and proceedings of the Board of Town Trustees were null and void because opposed to and in violation of Section one of the Fourteenth Amendment to the Constitution of the United States.

A demurer to this paragraph of answer was sustained (Rec., p. 32) and this was included in the second assignment of error in the State Supreme Court. (Rec. p. 61.)

The fourth paragraph of answer (Rec., p. 27) recited in detail the proceedings by the Board of Trustees without quoting them verbatim, contained the same allegations as the second paragraph in regard to the hearing accorded plaintiff in error and the theory upon which the assessments were made and the same allegations as to the interest of the trustees and alleged further as to the character of the improvement and its value to the lands and lots of plaintiff in error. (Rec., pp. 29, 51.)

That the total frontage of the defendant's land upon said improvement was 1,529.52 feet, and that the said town clerk in accordance with said ordinance, placed upon the town tax duplicate an assessment against defendant's said lands of $3.54 per lineal front foot, making a total of $5,414.50. Said defendant further says that the said street so improved is of the aggregate length of five thousand, one hundred, twenty-six and fifteen hundredths (5,126.15) feet; that on the east of said improvement said street is improved with macadam for a distance of about 1,760 feet to the east line of the said town

of Irvington; that on the west of said improvement the said Washington street is wholly unimproved for a distance of about 5,115 feet to the improvements in the city of Indianapolis, and that such unimproved portion is much worn and often in bad condition; that the said improved portions of Washington street are a portion out of what is called the National Road, which is a public highway, extending from beyond the city of Indianapolis on the west through the country far to the east of the said town of Irvington; that said highway is much used by the general public for travel and traffic from and to points east and west of said town of Irvington; that a considerable portion of the travel along and over said improvement is by all the citizens of Irvington or to or from said town of Irvington; and but a small part of the travel along and over said improvement is to or from the property abutting thereon or by the owners of said abutting property; that a large proportion of the real estate fronting on said improvement is unimproved and is beyond the part of said town of Irvington, where real estate is being improved; and is beyond that part of said town where improvements are likely to be made, and that there is no market for said real estate at this time, and there are no prospects that it can be sold in the near future for the purpose of being built upon and improved; that the street improvements described in plaintiff's complaint added nothing to the value of a large part of the real estate fronting upon said improvement; that said improvement is of no special benefit or advantage to said defendant or to the other owners of the abutting property along the line thereof; that the said defendant and the other abutting property owners derive no more benefit from such improvement than the other residents of said town and the general public throughout said county of Marion; that of the real estate belonging to this defendant, viz., lots 53, 54, 55, 56, 57, 58, 59 and 60, are unimproved and unoccupied; that there is no sale or market for such lots at this time, and there is no

probability of there being in the near future any sale or market for said lots or for any of them for improving or building purposes, or for any purpose by which said improvement of Washington street would be of any advantage to or add to the value of said lots or any of them; that said improvement does not add to the value of said lots or any of them; that said lots 53, 54, 55, 56, 57, 58 and 59 were of the value of four hundred dollars each; and that the assessment against said lots is in substantial, to-wit: $141.60 on each lot, excess of the special benefits received or which will be received by said lots; that said lot 60 is of the value of three hundred dollars, and that the assessment against said lot 60 is in substantial, to-wit: $327.45, excess of the benefits received or which will be received by said lot; that the land belonging to this defendant and described in plaintiff's complaint as part W. ½ of S. W. ¼ Sec. 3–15–4, is an irregular tract of 20.55 acres, lying in the northwest part of the corporate limits of said town of Irvington having a frontage of one thousand, one hundred, fifty-seven and two hundredths (1,157.02) feet on the north side of Washington street, and a depth of about 1,237 feet; that said real estate is not platted into lots, and there is no market or sale for said tract of land or any part thereof for building purposes, nor is there any prospect that there will be any such market or sale for said real estate or any part thereof in the near future; that the only value of said real estate is for pasturage, and that the said improvements of Washington street are of no special or peculiar advantage or benefit to said tract whatever, and that said improvements add nothing to the value of said tract of 20.55 acres; that said tract was of the value of twenty thousand dollars, and that the assessment against said tract is in substantial, to-wit: $4,095.85, excess of the special benefit received or which will be received by said tract from said improvement.

"It further alleges (Rec., pp. 30, 53) that by reason of the acts of said town Board of Trustees in passing said ordinance declaring the necessity for and providing for said improvement of Washington street, and in approving and confirming the engineer's report and the assessments made therein on the 26th day of April, 1899, and by each and every act of said board connected with or relating to said improvement, the defendant's property is taken without compensation and without due process of law, and that all of the said acts of said board and each of said acts is contrary to and in violation of the constitution and laws of the State of Indiana, and contrary to and in violation of the Constitution of the United States of America, and particularly of the first section of the fourteenth amendment to the Constitution of the United States of America.

" Wherefore, defendant, Sarah A. Hibben, prays that said assessment be declared void and that defendant have judgment for costs."

To this paragraph of answer a demurrer was sustained by the trial court (Rec., p. 32), and this ruling was included in the second assignment of error in the State Supreme Court. (Rec., p. 61.)

Plaintiff in error also filed cross-complaint, the first, second and third paragraphs of which were substantially the same as the second, third and fourth paragraphs of answer respectively. (Rec., pp. 33, 34, 49.) The cross-complaint asked that the collection of the assessments be enjoined and the title of plaintiff in error be quieted. (With the specific references to the record under the second, third and fourth paragraphs of answer we have included the corresponding references to the first, second and third paragraphs of cross-complaint.)

A demurrer to the cross-complaint was sustained (Rec., p. 54), and this was the third error specified in the State Supreme Court. (Rec., p. 61.)

The plaintiff in the trial court dismissed so much of his complaint as sought to foreclose a lien against the unplatted ground, and plaintiff in error refusing to plead further a decree was rendered foreclosing the lien as against the eight lots for the assessments, interest, costs and attorney's fees and directing sale to satisfy the same. (Rec., p. 56.)

From this judgment plaintiff in error appealed to the Supreme Court of Indiana, assigning as errors the overruling of the demurrer to the complaint, and the sustaining of the demurrers to the answers and the cross-complaints. (Rec., pp. 59, 61.)

The Supreme Court of the State affirmed the judgment of the court below. (Rec., p. 63.)

A petition for rehearing was overruled. (Rec., p. 66.)

ERRORS RELIED UPON.

The assignment of errors in this court is as follows: (Rec., p. 72.)

First. The Supreme Court of Indiana erred in affirming the judgment and decree of the Superior Court of Marion County, Indiana.

Second. The Supreme Court of Indiana erred in overruling appellant's petition for a rehearing.

Third. The Supreme Court of Indiana erred in holding that the act of the General Assembly of the State of Indiana approved March 8, 1889, being Chapter CXVIII of the laws of the State of Indiana passed at the fifty-sixth regular session of the General Assembly, published in the Acts of 1889,

at page 237, and all acts amendatory thereof, being Sections 4288 to 4299, both inclusive, of Burns' Revision of the Statutes of Indiana of 1894, afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fourth. That the Supreme Court of Indiana erred in holding that the ordinances, acts and proceedings of the town board of trustees of the Town of Irvington afforded to appellant due process of law, and that they were not opposed to and in contravention of the Constitution of the United States.

Fifth. The Supreme Court of Indiana erred in holding that the assessments upon appellant's lots were levied by due process of law, as guaranteed by the Constitution of the United States.

Sixth. The Supreme Court of Indiana erred in holding that, although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the refusal of such board of town trustees to give to appellant a hearing upon the amount of special benefits accruing to her lots and its refusal to permit appellant to introduce evidence as to the amount of actual special benefits accruing to her lots, did not deny to appellant due process of law, as guaranteed by the Constitution of the United States.

Seventh. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion County, Indiana, sustaining the demurrer of said William C. Smith to the third and fourth paragraphs of appellant's answer and the second and third paragraphs of appellant's cross-complaint, and to each of said paragraphs of answer and of cross-complaint, which paragraphs of answer and of

cross-complaint, each, alleged that the acts, ordinances and proceedings of the said board of town trustees, and the said assessments made by said board of trustees, did not afford appellant due process of law as guaranteed by the Constitution of the United States for the reason that said board of trustees refused to give to appellant a hearing upon the question of the amount of actual special benefits accruing to her said lots and refused to hear or permit appellant to introduce evidence as to the amount of actual special benefits accruing to her said lots.

Eighth. The Supreme Court of Indiana erred in holding that although the State law gave to the board of town trustees exclusive and final jurisdiction of the apportionment of assessments for street improvements, and required said board to judicially apportion such assessments upon the basis of actual special benefits, yet the assessment and apportionment of actual special benefits upon appellant's lots by a town board of trustees, all of the five members of which were residents and taxpayers of the town and two of the members of which owned lots and lands abutting upon the same improvement and at the same time assessed therefor by said board, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Ninth. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the third and fourth paragraphs of appellant's answers and the second and third paragraphs of appellant's cross-complaint and to each of said paragraphs of said answer and said cross-complaint, which paragraphs of answer and of cross complaint, each alleged that the acts, ordinances and proceedings of said board of town trustees, and the assessments made by said board of town trustees did not afford

to appellant due process of law as guaranteed by the Constitution of the United States for the reason that all of the five members the board of town trustees which fixed and levied the assessments of actual special benefits upon appellant's lots were residents and taxpayers of said town, and that two of said members owned lands and lots abutting upon the same improvement, and at the same time assessed therefore by said board.

Tenth. The Supreme Court of Indiana erred in holding that a State law which requires assessments for street improvements to be apportioned upon the basis of the actual special benefits, and which provides no method by which such benefits could or might be judicially fixed or determined, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Eleventh. The Supreme Court of Indiana erred in holding that the arbitrary levy for a street improvement of an assessment in substantial excess of the actual special benefits, which levy was not made according to any prescribed or recognized statutory method, afforded to appellant due process of law, as guaranteed by the Constitution of the United States.

Twelfth. The Supreme Court of Indiana erred in affirming the ruling and judgment of the Superior Court of Marion county, Indiana, in sustaining the demurrer of the said William C. Smith to the fourth paragraph of appellant's answer and the second and third paragraphs of appellant's cross-complaint, which paragraphs of answer and cross-complaint, each alleged that the assessments against appellant's lots and each of them were not made and levied by due process of law as guaranteed by the Constitution of the United States for the reason that said assessments and each of them were in

substantial excess of the actual special benefits accruing therefrom, and that said assessments were not made and levied according to any prescribed or recognized statutory method.

BRIEF OF ARGUMENT.

This action was originally brought to foreclose the lien of a local assessment for improving a street with curb and brick roadway. Plaintiff in error by her second paragraph of answer and first paragraph of cross-complaint (Rec. pp. 6, 33) alleged that the State law was invalid because it took her property without due process of law, thereby contravening the Fourteenth Amendment to the Constitution of the United States. By her third paragraph of answer and second paragraph of cross-complaint (Rec. pp. 7, 34) she attacked the constitutionality of the town ordinances in reference to the improvement upon the same ground, and by her fourth paragraph of answer and third paragraph of cross-complaint (Rec. pp. 27, 49) she attacked the constitutionality of the assessment itself upon the same ground.

The specific objection to the statute is that, while it grants to plaintiff in error a so-called hearing upon the question of actual special benefits, as it must do to be valid under the rule in Indiana, it does not provide for such a hearing as will constitute due process of law, but that it leaves the determination of the special benefits to an exercise of arbitrary power by the board of town trustees.

The specific objections to the ordinances and to the assessments are:

(1) That they are made not according to law, but by an exercise of arbitrary power (Rec. pp. 24, 28, 46, 50).

(2) That they were made by trustees having a direct pecuniary interest in the amount of the assessment antagonistic to the interest of plaintiff in error (Rec. pp. 26, 28, 47, 51), and

(3) That the assessment was in substantial excess of the special benefit accruing to the property of plaintiff in error (Rec. pp. 29, 47, 52).

The street improvement law in question, commonly known as the "Barrett Law," is in brief as follows:

Section one provides that the work may be ordered and done either upon petition or upon vote of the board of trustees and that the town shall have a lien for the cost thereof upon the lands and lots on the street.

Section two provides for a resolution of necessity, hearing thereon and notice thereof.

(It is held that this hearing is wholly advisory and not jurisdictional. *Hughes* v. *Parker*, 148 Ind. 692.)

Section three provides how the costs shall be apportioned, for the lien, for foreclosure of the lien and the extent of the town's liability. See appendix, p. i.

Section four provides for credit to property owners for improvements already made and for bonds by the contractors.

Section five provides for partial estimates and for payments by the town. See appendix, p. ii.

Section six provides for final report and estimate by the town engineer. See appendix, p. iii.

Section seven provides hearings and notices thereof, final assessment and the lien thereof and for payment of assessments in ten annual installments. See appendix, p. iv.

Section eight provides for issue and sale of bonds, and the lien thereof.

Section nine provides for the issue of certificates or bonds direct to the contractor, the lien thereof and of its foreclosure. See appendix, p. vi.

Section ten provides for collection by the town itself by way of precept and for appeal from such precept to the circuit court.

POINTS FOR ARGUMENT.

The claims of plaintiff in error are as follows:

First. In Indiana assessments for local street improvement are based upon and measured by the actual special benefits accruing to the land or lots assessed.

City of New Albany *v.* Cook, 29 Ind., 220;
Adams *v.* City of Shelbyville, 154 Ind., 467;
McKee *v.* Town of Pendleton, 154 Ind., 652;
DeFrees *v.* Ferstl, 154 Ind., 695, 696;
City of Indianapolis *v.* Holt, 155 Ind., 222, 240;
Taylor *v.* City of Crawfordsville, 155 Ind., 403, 405;
Schaefer *v.* Werling, 156 Ind., 704;
Shank *v.* Smith, 157 Ind., 401;
Leeds *v.* DeFrees, 157 Ind., 392;
Wray *v.* Fry, 158 Ind., 92;
Marion Bond Co. *v.* Johnson, 29 Ind. App., 294;
Klein *v.* Nugent Gravel Co. (Ind. App.), 66 N. E., 486.

Second. The determination of the actual special benefits is a judicial function.

Black on Judgts., §§ 290, 291;
Cooley Const. Lim. (6″ Ed.), 108;
Cooley on Taxation, 265, 266;
Elliott on Mun. Corp., 130;
Elliott Roads and Streets (2d Ed.), §§ 281, 564;
Van Fleet, Coll. Att., § 16;
Brown *v.* City of Denver, 7 Col., 305, S. C.; 3 Am. & Eng. Corp. Cas., 630;
Flournoy *v.* City of Jeffersonville, 17 Ind., 169;
City of Ft. Wayne *v.* Cody, 43 Ind., 197;
Campbell *v.* Dwiggins, 83 Ind., 473;

Sunier *v.* Miller, 105 Ind., 393;
Harman *v.* Moore, 112 Ind., 227;
Garvin *v.* Daussman, 114 Ind., 429;
Kuntz *v.* Sumption, 117 Ind., 1;
Campbell *v.* Board of Com., 118 Ind., 119;
Barber, etc. Co. *v.* Edgerton, 125 Ind., 455;
Thompson *v.* Goldthwait, 132 Ind., 20;
Guckien *v.* Rothrock, 137 Ind., 355;
Adams School Twpt. *v.* Irwin, 150 Ind., 12;
Kirsch *v.* Braun, 153 Ind., 247;
Town of Greenwood *v.* Lawson (Ind.), 64 N. E., 849, 850;
Motz *v.* City of Detroit, 18 Mich., 495;
Thomas *v.* Gain, 35 Mich., 155;
Whiteford Tp. *v.* Probate Judge, 53 Mich., 130;
Overing *v.* Foote, 65 N. Y., 263;
Stuart *v.* Palmer, 74 N. Y., 183;
City of Phila. *v.* Miller, 49 Pa. St., 440;
Santa Clara *v.* Southern Pacific R. R. Co., 13 Am. & Eng. R. R. Cas., 182;
Meyers *v.* Shields, 61 Fed., 713, 728;
Murray's Lessee *v.* Hoboken Land and Improvement Co., 18 How., 272, 284;
Hagar *v.* Reclamation District No. 108, 111 U. S., 701, 710;
Dewey *v.* Des Moines, 173 U. S., 193.

Third. Due process of law as guaranteed by the 14th Amendment to the Constitution of the United States requires that the property of plaintiff in error be not taken away by an arbitrary act of the board of trustees of Irvington.

Magna Charta;
Petition of Rights, 1 Car. I, c. 1;
Bill of Rights, 1 W. & M. Sess. 2, c. 2;

Stamp Act;
Journal Confederative Congress, Vol. XII, p, 58;
Journal of Congress, Vol. 1, p. 28, Ed. Phil. 1800;
Ordinance of 1787, Art. 4;
4 Black. Com., 424;
Broom Max. (8th Am. ed.), 113;
2 Coke Inst., p. 46;
Cooley Const. Lim. (6th Ed.), 35, 104, 429, 599;
Cooley on Taxation (2d Ed.), 674;
2 Kent. Com. (11th Ed.) 2, Note, 3, 6;
Story on Const. vol. 2, § 1789;
Boswell's Case, 6 Rep., 52 a;
Bagg's Case, 11 Rep., 93 b. 99 a;
Prohibition del Roy, 12 Rep., 63;
Rex *v.* Chancellor of Cambridge (Dr. Bentley's Case), 1 Strange, 557;
Rex *v.* Beun, 6 T. R., 198;
Harper *v.* Carr, 7 T. R., 266, 270;
Rex *v.* Geskin, 8 T. R., 209;
Capel *v.* Childs, 2 Cromp. & Jer., 558, 574;
Bonaker *v.* Evans, 16 Q. B., 162, 170;
In re Hammersmith Rent Charge, 4 Exch., 87, 97;
Graham *v.* Furber, 14 C. B., 134, 165 (78 E. C. L. R.);
Reg. *v.* Archbishop of Canterbury, 1 E. & E., 545, 559 (102 E. C. L. R.);
Cooper *v.* Board of Works, 108 E. C. L. R., 181.
In re Brook, 16 C. B. N. S. 403, 416 (111 E. C. L. R.);
Reg. *v.* Saddler's Co., 10 H. L. Cas., 404;
Zeigler *v.* S. & N. Ala. R. R. Co., 58 Ala., 594;
Klein *v.* Nugent Gravel Co., 66 N. E. 486 (Ind. App.);
Jones Co. *v.* Perry, 26 Ind. App., 554;
Campbell *v.* Dwiggins, 83 Ind., 473;
Lipes *v.* Hand, 104 Ind., 503, 507;
Heick *v.* Voight, 110 Ind., 279, 285;

Wilkins *v.* State, 113 Ind., 514;
Kuntz *v.* Sumption, 117 Ind., 1;
State *v.* Noble, 118 Ind., 350, 366, 370;
Langenberg *v.* Decker, 131 Ind., 471;
People *v.* Chase, 165 Ill., 527;
Freeland *v.* Hastings, 10 Allen, 570, 575;
Whitcomb Case, 120 Mass., 118;
Paul *v.* Detroit, 32 Mich., 108, 118;
Sanborn *v.* Fellows, 22 N. H., 473;
Stuart *v.* Palmer, 74 N. Y., 183;
Ex parte Logan Branch Bank, 1 Ohio St., 432;
State *v.* Guilbert, 56 Ohio St., 575;
Harmon *v.* State, 66 Ohio St., 249;
Railroad Tax Cases, 13 Fed., 722, 734, 751, 755;
Calder *v.* Bull, 3 Dallas, 388;
Bank of Columbia *v.* Okely, 4 Wheat., 235, 244;
McCullough *v.* State of Maryland, 4 Wheat., 316, 427;
Van Ness *v.* Pacard, 2 Pet., 137, 144;
Murray's Lessee *v.* Hoboken Land Etc. Co., 18 How., 272;
McVeigh *v.* United States, 11 Wall., 259;
State Tax on Foreign Held Bonds, 15 Wall., 300, 319;
Galpin *v.* Page, 18 Wall., 350, 368;
Windsor *v.* McVeigh, 93 U. S., 274;
Pearson *v.* Yewdall, 95 U. S., 294;
Davidson *v.* New Orleans, 96 U. S., 97, 104;
Hurtado *v.* California, 110 U. S., 516, 536;
Hagar *v.* Reclamation District No. 108, 111 U. S., 701, 708;
Hovey *v.* Elliott, 167 U. S., 409;
French *v.* Barber Asphalt Paving Co., 181 U. S. 324;

Fourth. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that no man shall be judge in his own cause.

Bacon's Abr. "Jury" M., 3;
Bouvier Law Dict., tit., Judge;
1 Brooks Abr., 177, tit. conusans, 27;
Broom. Max. (8th Am. Ed.), 116, 120;
Burns Justice, III, 132;
C. 3, 5, 1;
Coke, Litt., 141 a, Sec. 212;
Com. Dig., 101, 4, Justices, I, 3;
Cooley Const. Lim. (6th ed.), 506;
Domat's Public Law, lib. 2, tit. 1, sec. 2, 14;
Elliott on Mun. Corp., § 130;
Freeman on Judgments (4th ed.), §§ 144, 145, 147;
4 Inst., 71;
Just. Code, lib. 1, tit. 1, 16;
Littleton, § 212;
Pandects, pars. II, lib. 5, 17;
Pothier's Pro. Civ., C. 2, Sec. 5;
Rolle, Abr. Judges, Pl. 11;
14 Vin. Abr., 573, Pl. 28;
Voet. ad. Pand. lib. 5, tit. 1, 43;
Jenk. 40, case 76; 90, case 74;
Bonham Case, 8 Coke, 212, 219, 224;
Earl of Derby's Case, 12 Coke, 114;
Day *v.* Savadge, Hob., 85;
Anonymous, 1 Salk., 396;
Great Charte *v.* Kensington, 2 Str., 1173;
Hasketh *v.* Braddock, 3 Burr., 1847;
Queen *v.* Com. for Cheltenham, 1 A. and E. N. S., 468;
Reg. *v.* Justices of Surrey, 21 L. J. M. C., 195;
Esdaile *v.* Lund, 12 M. & W., 734;
Queen *v.* Justices of Hertfordshire, 6 Q. B., 753;
Reg. *v.* Upton St. Leonard's, 10 Q. B., 827; (59 E. C. L. R.);

Reg. *v.* Aberdare Canal Co., 14 Q. B., 853; (68 E. C. L. R.);
Queen *v.* Justices of Suffolk, 18 Q. B., 416;
Regina *v.* Justices, 14 Eng. L. and Eq., 93;
Dimes *v.* Grand Junction Canal, 3 H. L. Cas., 759, 793;
Ranger *v.* Great Western Ry. Co., 5 H. L. Cas., 72, 88, 89;
State *v.* Castleberry, 23 Ala., 85;
Heydenfeldt *v.* Towns, 27 Ala., 423;
Heilbron *v.* Campbell, 23 Pac. Rep., 122 (Cal.);
North Bloomfield Gravel Min. Co. *v.* Keyser, 58 Cal., 315;
Donnelly *v.* Howard, 60 Cal., 291;
Lent *v.* Tillson, 72 Cal., 404, 428;
City of Oakland *v.* Oakland Water Front Co., 118 Cal., 249;
Meyer *v.* City of San Diego, 121 Cal., 102;
Ramish *v.* Hartwell, 126 Cal. 443;
Hadley *v.* Dague, 130 Cal., 207;
Hawley *v.* Baldwin, 19 Conn., 585;
Appeal of Nettleton, 28 Conn., 268;
Ochus *v.* Shelden, 12 Fla., 138;
Ex Parte Harris, 26 Fla., 77; S. C., 23 Am. St. Rep., 548;
State *v.* Young, 31 Fla., 594;
Klein *v.* Tuhey, 13 Ind. App., 74;
Hern *v.* City of Greensburg, 51 Ind., 119;
Hudson *v.* Wood, 52 N. E., 612 (Ind. App.);
Board of Com. of Fountain Co. *v.* Loeb, 68 Ind., 29;
Shoemaker *v.* Smith, 74 Ind., 71, 75;
Fechheimer *v.* Washington, 77 Ind., 366;
Town of Albion *v.* Hetrick, 90 Ind., 545, 549;
Bradley *v.* City of Frankfort, 99 Ind., 417;
Block *v.* State, 100 Ind., 357;

Pearcy *v.* Mich. Mutual Life Ins. Co., 111 Ind., 59;
Chicago & Atlanta Ry. Co. *v.* Summers, 113 Ind., 10;
Zimmerman *v.* State, 115 Ind., 129;
Markley *v.* Rudy, 115 Ind., 533;
City of Goshen *v.* England, 119 Ind., 368;
Bass *v.* City of Ft. Wayne, 121 Ind., 389;
Board of Com. Carroll Co. *v.* Justice, 133 Ind., 89;
Board *v.* Heaston, 144 Ind., 583;
Chicago & E. R. Co. *v.* City of Huntington, 149 Ind., 518;
Adams *v.* City of Shelbyville, 154 Ind., 467;
Gaff *v.* State, 155 Ind., 277;
Clifford *v.* York Co. Com., 59 Me., 262;
Buckingham *v.* Davis, 9 Md., 324;
Gay *v.* Minot, 3 Cush., 352, 354;
Inhabitants of North Hampton *v.* Smith, 11 Metc. (Mass.), 390;
Tolland *v.* County Com., 13 Gray, 12;
Pearce *v.* Atwood, 13 Mass., 324;
Taylor *v.* County Com. of Worcester, 105 Mass., 225;
Hall *v.* Thayer, 105 Mass., 219;
Ames *v.* Port Huron Log Driving & Booming Co., 11 Mich., 139;
Peninsula R. R. Co. *v.* Howard, 20 Mich., 18, 25;
Stockwell *v.* Township Board of White Lake, 22 Mich., 341;
Paul *v.* Detroit, 32 Mich., 108, 117;
Galbreath *v.* Newton, 30 Mo. App., 380;
Russell *v.* Perry, 14 N. H., 152;
Sanborn *v.* Fellows, 22 N. H., 473;
Moses *v.* Julian, 45 N. H., 52;
Stearns *v.* Wright, 51 N. H., 600, 610;
State *v.* Newark, 1 Dutcher, 399, 405;
Peck *v.* Freeholders of Essex, 21 N. J. L., 656;

Schroder *v.* Ehlers, 31 N. J. L., 44;
State et. al. *v.* Crane, 36 N. J. L., 394;
Traction Co. *v.* Board of Works, 56 N. J. L., 431;
Foster *v.* Cape May, 60 N. J. L., 78, 82;
Washington Ins. Co. *v.* Price, 1 Hopk. Ch., 1;
Oakley v. Aspinwall, 3 N. Y., 547;
Converse *v.* McArthur, 17 Barb. 410, 411;
Edwards *v.* Russell, 21 Wend., 64;
Diveny *v.* City of Elmira, 51 N. Y., 506;
White *v.* Connelly, 105 N. C., 65;
Gregory *v.* Cleveland R. R. Co., 4 O. St., 675;
Schroder *v.* Overman, 61 Ohio St. 1;
Conklin *v.* Squire, 29 Weekly Law Bull., 157;
City of Guthrie *v.* Shaffer, 7 Okl., 459;
Cleveland *v.* Tripp, 13 R. I., 50;
Wetzel *v.* State, 5 Tex. Civ. App., 17;
Templeton *v.* Giddings, 12 S. W. Rep., 851 (Tex.);
Chambers *v.* Hodges, 23 Tex., 104;
Taylor *v.* Williams, 26 Tex., 583;
State *v.* City of Cisco (Tex. Civ.,) 33 S. W., 244;
Austin *v.* Nalle, 85 Tex., 520;
Barnett *v.* Ashmore, 5 Wash. St., 163;
Findley *v.* Smith, 42 W. Va., 299;
Jefferson Co. *v.* Milwaukee Co., 20 Wis., 139;
Case *v.* Hoffman, 100 Wis., 314, 351;
Meyers *v.* Shields, 61 Fed., 713, 723;
Aultman & Taylor Co. *v.* Brumfield, 94 Fed., 423;
Calder *v.* Bull., 3 Dallas, 386, 388;
Pennoyer *v.* Neff, 95 U. S., 714, 733;
Wight *v.* Davidson, 181 U. S., 371;

ARGUMENT.

First. In Indiana assessments for local street improvements are based upon and measured by the actual special benefits accruing to the land or lots assessed.

This principle was laid down in the early case of *City of New Albany* v. *Cook*, 29 Ind., 220, and was repeated many times afterwards, but up to 1889 the State courts followed the authorities that held that the legislature might conclusively determine the method of measuring the special benefits. The frontage rule was adopted in 1852 and for many years it was fairly satisfactory. Under the conditions of urban growth and improvement it was probably as just a method as any. But it developed that this method often worked great hardship and not infrequently it operated to confiscate property because the assessment was greater than the value of the property after the improvement was made. Two causes contributed to this result. First, the sudden development of electrical communication by way of trolley cars and telephones broke up the compact growth of cities and towns, destroyed the uniformity of values and stimulated the suburbs of towns and small cities. Second, this change of conditions greatly stimulated municipal improvements and the Middle West entered upon a wild and unreasoning era of street improvements that has stretched out hundreds of miles of beautiful brick roadway and cement sidewalks through fields of wheat and corn and has confiscated hundreds of thousands of dollars' worth of property. The front foot method no longer approximated justice. To meet the requirements of the change the General Assembly of Indiana in 1889 enacted the law now before this court. The front foot rule was not wholly abandoned, but it was made the *prima facie* rule only. It provided in section seven that the *prima facie* front foot assessment should be changed to the actual

special benefits after a judicial hearing of evidence by the board of town trustees and that such a hearing, or an opportunity for such a hearing of the property owners was essential to the validity of the assessment.

The present rule in Indiana and the only rule that can be supported upon principles of justice and right, is stated in the case of *Adams* v. *City of Shelbyville*, 154 Ind., 467, as follows:

"We conclude, therefore, that the principles applicable to assessments for local improvements are these: The legislature may create or authorize a municipality to create a local taxing district for local improvement purposes, which includes part only of the property within the municipality. The legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district. Each parcel of contributing property may be assessed only to the extent that it actually receives special benefits. The taxing district, as a whole, may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property. The improvement, so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district, is a benefit to the municipality at large and such excess must be borne by the general treasury. Property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits. * * * * * * * * * * * The published notice calls attention of all persons affected that the report of the engineer is before the council for consideration, and that the same is subject to such alterations as the council may deem just in adjusting the several assessments to the basis of actual benefits and all persons concerned are bound to know that the *prima facie* assessments against their property are liable to be increased as well as decreased. * * * * * * * * * * * * * * * * * On the other hand, if we read section three as providing a basis for assessments which shall be *prima facie* correct and which shall be held to be true and correct assessment until assailed by the property owner and shown upon a hearing by

a preponderance of proof or found to be unjust and altered and amended by the common council of its own motion, then we find sections 3, 6 and 7 in complete harmony, each effective and in accord with the other provisions of the act. * * * We therefore conclude that section 3, Acts 1889 (section 4290, Burns' Rev. St., 1894) must be construed as providing a rule of *prima facie* assessments in street and alley improvements, which allotments by the city or town engineer, under section 6 of said Act of 1889 (section 4293, Burns' Rev. St., 1894) are subject to review and alteration by the common council and board of trustees under section 7 of said Act of 1889 as amended (Acts 1891, p. 324; acts 1899, p. 64, Burns' Rev. St., 1894, § 4294) upon the basis of actual special benefits received by the improvement; and that under section 7 the common council of a city or board of trustees of an incorporated town have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners."

The same doctrine has been affirmed and followed by the subsequent Indiana cases as the only theory upon which the law was constitutional.

McKee v. *Town of Pendleton*, 154 Ind., 652;
DeFrees v. *Ferstl*, 154 Ind., 695, 696;
City of Indianapolis v. *Holt*, 155 Ind., 222, 240;
Taylor v. *City of Crawfordsville*, 155 Ind., 403, 405;
Schaefer v. *Werling*, 156 Ind., 704;
Gorman v. *State ex rel. Koester*, 157 Ind., 205;
Shank v. *Smith*, 157 Ind., 401;
Leeds v. *DeFrees*, 157 Ind., 392;
Wray v. *Fry*, 158 Ind., 92;
Marion Road Co. v. *Johnson*, 29 Ind. App., 294;
Klein v. *Nugent Gravel Co.*, (Ind. App.); 66 N. E., 486.

In the case at bar (reported in 158 Ind., 206, Rec. p. 64,) the court quoted from *Leeds* v. *DeFrees*, *Supra*, as follows:

"The statute in question, as shown, provides a tribunal for that purpose, and further provides that an aggrieved person shall have the right to appear before it and be accorded a hearing on his objections to the proposed assessment. The power to hear the complaint of the aggrieved owner carries with it such implied power as will make the hearing effectual; for the rule is well settled that, when a general power is granted by a statute, every necessary power for the effectual exercise thereof is given by implication." (Citing authorities.)

"Possessing such general power under the statute, the council certainly had the right, upon a hearing, to award adequate and effectual relief by ultimately apportioning the cost of the improvement to the several pieces of property according to the benefits resulting to each on account of the improvement. It is true that the statute provides what may be considered as *prima facie* evidence of the benefits received by abutting property, but such standard or evidence is not conclusive, as the council has the right to so apportion the cost as to make it conform to the benefits derived."

Second. The determination of the actual special benefits is a judicial function.

Speaking of the judicial powers of government Mr. Cooley in his work on Constitutional Limitation (6th Ed., p. 108), says:

"The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law. And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions. And in another case it is said: The legislative power ex-

tends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State Constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative. That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."

So long as the legislature determined conclusively in advance that the special benefits were measured by the frontage there was no exercise of judicial power. The amount of the assessment was fixed by mathematical measurements and calculations thereon. There was a fiction that making the assessment was a judicial or a quasi judicial act to justify the corresponding fiction that the assessments represented the special benefits.

The nature of the hearing adapted to the different circumstances was well stated in *Garvin* v. *Daussman*, 114 Ind., 429. The Court said:

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding, and that it afford the owner an opportunity to be heard concerning the legality of the assessment, before some tribunal or body authorized to correct errors, or give appropriate relief, before the property is taken or the charge made absolute. * * * The Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter or favor have a hearing. The law

must require notice to them, and give them the right to a hearing and an opportunity to be heard." *Stuart* v. *Palmer*, 74 N. Y., 183.

* * * "The fact must, however, be kept in view that the notice and hearing which the constitution demands need only be such as are adapted to the nature of the assessment proposed, and such as afford to each individual affected the opportunity to show that, according to the method prescribed by competent authority for making the assessment, the amount charged against him is incorrect. In the imposition of poll or occupation taxes, where a certain sum is assessed against each individual exercising a given avocation, or according to his age, without regard to actual benefits, the necessity of notice and a hearing is reduced to a minimum. To a measurable extent, the same principle is involved when the cost of an improvement is, as by law in proper cases it may be, apportioned by mere mathematical calculation, according to a certain rate per front foot." * * * * "In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.' If the law directing the proceedings affords the property owner an opportunity to be heard, after due notice, in a tribunal competent to afford him relief appropriate to the nature of the case, so that the charge against his property only becomes conclusive after the opportunity for a hearing has been had, it cannot be said that his property has been taken or burdened without due process of law." * * * * "The legislature may commit to the common council of a city, or to a tribunal specially provided for the purpose, the power of apportioning the cost of an improvement, and of assessing the expense thereof, upon the property benefited in the manner provided by law, unless the method prescribed is plainly unadapted to arriving at a fair and equitable result, and, also, to determine what property within the limits defined, if any are defined, will be benefited by the improvement. In respect to all such

questions, the determination of the common council or other body, within the limits of the jurisdiction specially committed to it, may be made conclusive."

But under the present rule the frontage assessments are only "*prima facie* correct, and which shall be held to be the true and correct assessments until assailed by the property owner, and shown upon a hearing by a preponderance of proof." Now, "property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits."

Such a hearing is wholly of a judicial sort and quite different from those hearings of an administrative sort where an officer is required to act or refuse to act after a showing of the existence or non-existence of a certain state of facts.

Here plaintiff in error is entitled to have the assessments against her lots limited by the special benefits accruing to them. She is entitled to a hearing as to the amount of such benefits. She is entitled to introdnce on such hearing the evidence of persons competent to estimate the amount of such benefits. She is entitled to hear and cross-examine the witnesses upon the same question offered by other property owners and by the town. Presumably she is entitled to have all the proof given under oath, to have the aid of process to enforce the attendance of witnesses in her behalf. The law has not in terms provided for these matters, but the State Supreme Court has said either directly or by inevitable inference, that the law implies them. Last, but not least, the State Supreme Court has said that the plaintiff in error is entitled to have the amount of the assessment fixed, ascertained and determined "by a preponderance of proof," and not by arbitrary authority, not upon an arbitrary basis, whether that of frontage, area or value. She was entitled to have the proof heard under reasonable rules and restrictions and to have this proof weighed and considered by an impartial tribunal, and to have the assessment fixed according

to the preponderance thereof, and according to the law as enacted by the legislature and as construed by the State Supreme Court. All this is as purely judicial as the functions of this honorable Court in hearing this writ of error. But she had none of these. (Rec. pp. 24, 28, 46, 50.)

Elliott, in his work on Municipal Corporations, says of the exercise of the right of Eminent Domain by municipalities: "It is necessary that some impartial tribunal exercising judicial power be provided for assessing the damages to be awarded. It may consist of a court, a court and jury, or commissioners selected by the court." (Sec. 130.)

In a case similar to this one the court said:

"The law imposed upon him (the County Auditor) the duty of hearing and weighing evidence, and rendering a decision upon it. This necessarily involved the exercise of judicial discretion."

Meyers v. *Shields*, 61 Fed. Rep., 713–728.

Of the character of such acts the court said, in *Flournoy* v. *City of Jeffersonville*, 17 Ind., 169: "The judicial power of this State is vested in courts. A judicial act, then, must be an act performed by a court touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of a ministerial officer; in short, by ministerial acts." * * * "A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."

In the case of *City of Fort Wayne* v. *Cody*, 43 Ind., 197, the Court held that the question of benefits for a sewer could not be reviewed by the Court, for the reason that the power of determining the benefits was vested in the Council; that it acted judicially and that its determination was final.

The right of a board of equalization to increase an individual valuation, and of a county auditor to increase gravel

road assessments without due notice, was denied on the ground that they were judicial acts, and that due process of law required notice and a hearing.

Kuntz v. *Sumption*, 117 Ind., 1;
Campbell v. *Board of Com.*, 118 Ind., 119.

In the case of *Barber, etc. Co.* v. *Edgerton*, 125 Ind., 455, it was sought to enjoin a street improvement made under the Barrett Law. It was decided that Sections 6 and 7 gave a constitutional hearing. "Assessments to pay for the improvement are made upon the assumption that the property affected is benefited in a sum equal to the cost. But whether such improvement does or does not benefit the property in a sum equal to its cost, is essentially a judicial question, upon which the property owner is entitled to notice and a hearing. Elliott, Roads and Streets, p. 397."

The case of *Thompson* v. *Goldthwait*, 132 Ind., 20, was a proceeding to locate a free gravel road. Held, that the duties of the viewers were judicial and that they must be disinterested.

Guckien v. *Rothrock*, 137 Ind., 355, was a ditch assessment case. Held, that the Auditor could not increase the assessment. Making or increasing the amount was a judicial act. If made by the Auditor it was void, because he was a ministerial officer. If made by the commissioners it was void, because no notice was given. "The Auditor cannot determine the benefits nor, indeed, any other purely judicial question. * * * It would, at all events, deprive the land owners of the constitutional right to have benefits assessed by due process of law."

The court held in *Dewey* v. *Des Moines*, 173 U. S., 193, that a State cannot, by legislation or judicial action, make a non-resident personally liable to pay an assessment for a local improvement because to do so would be to render a per-

sonal judgment against a person over whom the State and its courts had no jurisdiction, the assessment having the force of a judgment of a court. To the same effect see *Hagar* v. *Reclamation District No. 108*, 111 U. S., 701, 710, and note; *Stewart* v. *Palmer*, 74 N. Y., 186; *Leeds* v. *DeFrees*, 157 Ind., 392; *Town of Greenwood* v. *Lawson*, (Ind.); 64 N. E., 849, 850.

In this case the Supreme Court of Indiana decided that the assessment made by the town board of Irvington was a judgment, with all the incidents of the judgment of a court. The court said:

"So long as the board of trustees keeps within the limits of its jurisdiction, its decision or judgment in the premises must be held to be binding and conclusive on all persons concerned until set aside or annulled by some direct proceeding known to the law, based on reasons or grounds which the law recognizes as sufficient for that purpose. *City of Ft. Wayne* v. *Cody*, 43 Ind., 197; *Anderson* v. *Baker*, 98 Ind., 587; *Sunier* v. *Miller*, 105 Ind., 393; 4 N. E., 867; *Garvin* v. *Dausman*, 114 Ind., 429; 16 N. E., 826; 5 Am. St. Rep., 637; *Motz* v. *City of Detroit*, 18 Mich., 495; *Harman* v. *Moore*, 112 Ind., 227; 13 N. E., 718; *School Tp.* v. *Irwin*, 150 Ind., 12; 49 N. E., 806; *Kirsch* v. *Braun*, 153 Ind., 247; 53 N. E., 1082; Black, Judgm., §§ 290, 291. The doctrine seems to be well settled that in order to render a judgment of a court or other tribunal invested with power to decide in a matter void, so as to open such judgment to a collateral attack, an absence must be shown of either, first, a legal organization of the tribunal; or, second, jurisdiction over the subject-matter; or, third, jurisdiction over the person; or, fourth, one or more of these matters must appear to have been lost after it or they once existed. Van Fleet, Coll. Attack, § 16.

Whether or not it is a judicial hearing depends upon the nature of the proceeding, the end to be attained and the recognized methods of attaining them. The legislature cannot make it judicial or non-judicial by arbitrary fiat.

As was said in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How., 272, 284:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admirality; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

Third. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that the property of plaintiff in error be not taken away by an arbitrary act of the Board of Trustees of Irvington.

We first note that the assessment was in substantial excess of the special benefits. (Rec. pp. 29, 47, 52.) One lot worth $300 was assessed $327.45. This is confiscation. The other lots, worth $400 each, were assessed $141.60 each, without any special benefit accruing. This was partial confiscation. About ⅛ of the unplatted ground was assessed $4,095.85 without any special benefit. This would approximate total confiscation. Plaintiff in error has not rested upon the bare allegation of the conclusions of fact, that her property was not specially benefited. It appears from the answer and cross-complaint (Rec. pp. 29, 51) that Irvington is a small suburb of the City of Indianapolis, and that communication is had between the two over Washington street, the street improved, which is the designation for that part of the old National Road, a through east and west highway, embraced in the limits of the said city and town; that Washington street is improved with macadam from the east line of Irvington west a distance of about ⅓ of a mile to the brick improvement in controversy, which extends westward nearly one mile. From the west end of the brick roadway Washington street or the National road is unimproved for about one mile, when the improvements of the City of Indianapolis commence. We would expect a great deal of through travel

along this highway between Irvington and Indianapolis, and between points beyond them. Much of the unimproved and unoccupied land usually found between a city and a suburban town was along this mile long improvement. The plaintiff in error owned along this part of the street eight vacant and unimproved lots. They were in that part of the town that was undeveloped and unimproved. The street in front of them served only as a means of communication between other points. No one traveled it coming to or going from these lots. The town was not improving or developing about them, hence the improvement added very little, if anything, to their prospective or speculative value. And as to the frontage of 1157.02 feet of the 20 acre tract, assessed at $4,095.84, the same facts were true. Its only present use was as a cow pasture. A brick roadway adds but little to the value of a cow pasture. Situated as it was, the roadway added but little to its prospective or speculative value.

The answers and cross-complaints disclose the occasion of this unjust and inequitable assessment. (Rec. pp. 24, 28, 46, 50.) It was not a mistake or error of judgment as to the facts on the part of the assessing tribunal. The board of town trustees did not give or grant a hearing as the law required; it refused to hear proof that the *prima facie* front foot assessment was unjust; it did not in any wise consider or inquire into the actual special benefits; it did not make the final assessment according to any law of Indiana, but it arbitrarily confirmed as the assessment, the *prima facie* estimate of the engineer at $3.54 per front foot upon all the property abutting upon the improvement; and this arbitrary action confiscated all the value of a part of the lands and lots belonging to the plaintiff in error, and a substantial part of the value of her other lands and lots, all without due process of law, and contrary to the Fourteenth Amendment to the Constitution of the United States.

The guarantee of "due process of law" or "the law of the land" is a guarantee against the exercise of arbitrary power.

Freedom from arbitrary power is the chief and fundamental maxim of Angle Saxon and Constitutional government.

Audi alteram partem.

No man shall be condemned unheard.

Broom. Max. (8th Am. ed.), 113;
In re Brook, 16 C. B. N. S., 416. (111 E. C. L. R.)
In re Hammersmith Rent Charge, 4 Exch., 97;
Reg. v. *Archbishop of Canterbary*, 1 E. & E. 559 (102 E. C. L. R.);
Reg. v. *Saddler's Co.*, 10 H. L. Cas., 404;
Boswell's Case, 6 Rep., 52 a.
Graham v. *Furber*, 14 C. B., 134, 165 (78 E. C. L. R.);
Prohibition del Roy, 12 Rep. 63;
Capel v. *Childs*, 2 Cromp. & Jer., 558;
Bonaker v. *Evans*, 16 Q. B., 162;
Bagg's Case, 11 Rep., 93 b., 99 a;
Rex v. *Chancellor, etc. of Cambridge* (*Dr. Bentley's Case*), 1 Strange, 557;
Rex v. *Beun*, 6 T. R., 198;
Harper v. *Carr*, 7 T. R., 270;
Rex v. *Geskin*, 8 T. R., 209.
Story on Const., vol. 2, § 1789.

Mr. Cooley, in his work on Constitutional Limitations (6th Ed., p. 431), says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which

govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.' The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry and render judgment only after trial. It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.' When the law of the land is spoken of, 'undoubtedly a pre-existing rule of conduct' is intended, not an *ex-post facto* rescript or decree made for the occasion. The design is to exclude arbitrary power from every branch of the government and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute."

See 4 Black. Com., 424;
2 Kent. Com. (11th Ed.), 2, note 3;
Campbell v. *Dwiggins*, 83 Ind., 473;
Harmon v. *State*, 66 Ohio St., 249;
Railroad Tax Cases, 13 Fed., 722, 751, 755;
State Tax on Foreign Held Bonds, 15 Wall., 300, 319;
Davidson v. *New Orleans*, 96 U. S., 97, 104;
Hagar v. *Reclamation District No. 108*, 111 U. S., 701, 708.

As was said by Mr. Justice Johnson, of this court, in the case of *Bank of Columbia* v. *Okely* (4 Wheat., 235, 244):

"As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind

has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

The constitutional guaranty extends to the protection of individual cases against the arbitrary action of the courts.

Hovey v. *Elliott*, 167 U. S., 409.

In this case Mr. Justice White said:

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they are created to prevent. In *Galpin* v. *Page*, 18 Wall., 350, the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld when justice is justly administered.'"

The court, the town board of Irvington, had no legislative authority to make the assessment without a hearing and consideration of the actual benefits. It acted without its jurisdiction, and its judgment was void.

In *McVeigh* v. *United States*, 11 Wall., 259, on writ of error to the United States District Court, Mr. Justice Swayne said:

"In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." Citing *Calder* v. *Bull*, 3 Dallas, 388; *Bonaker* v. *Evans*, 16 A. & E. N. S., 170; *Capel* v. *Childs*, 2 Compton & Jervis, 574.

In the case of *Windsor* v. *McVeigh*, 93 U. S., 274, growing out of the same controversy, Mr. Justice Field, after quoting the above language, said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has

anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and when he has appeared, saying, Your appearance shall not be recognized and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.

"The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. A denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether."

In *Zeigler* v. *S. & N. Ala. R. R. Co.*, 58 Ala., 594, the Court said:

"Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise and to have the right of controverting, by proof, every material fact which bears on the question of

right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

In *Paul* v. *Detroit*, 32 Mich., 108, 118, it was held that a city charter which required that the jury when sworn, shall "go to the place of intended improvement and upon, or as near as may be practicable, to any property intended to be taken, and described in said notice, and after carefully inspecting the same, shall return at once to the court and first determine the necessity of making the improvement and of using the property intended to be taken therefor, and if they shall find in the affirmative, they shall in open court next hear evidence and objection relating thereto, and determine the award, etc.," to be unconstitutional because an essential fact was found without an actual hearing.

This court has held that the Federal guaranty of due process of law does not require that special assessments for local improvements be levied according to the actual special benefits, because (a) the constitution does not specifically so provide, and (b) because "the law of the land" of England, and of the colonies before the formation of the Constitution did not recognize any such necessity, but sanctioned the collection of such charges by summary process in the nature of a distress warrant.

French v. *Barber Asphalt Paving Co.*, 181 U. S., 324.

This court there said, on page 330, quoting from *Murray's Lessee* v. *Hoboken Land Co.*, 18 How., 272;

"The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free

to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Such a method of collecting assessments for local improvements might have been due process of law a hundred years ago because adapted to the nature of the case, but it is not generally recognized as due process of law to-day, because under the present industrial conditions it violates the constitutional guaranty against arbitrary exactions. The Federal constitution does not extend to forms of taxation, but it does extend to the fundamental principles upon which the right of taxation depends.

In *Van Ness.* v *Pacard*, 2 Pet., 137, 144, Mr. Justice Story said:

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

And those principles were the same and were as well recognized a hundred years ago as they are to-day. And one of the fundamental maxims was that taxes should not be levied and collected arbitrarily. What the legislature establishes must not violate any of the fundamental maxims of our form of government. The Federal constitution regulates the exercise of the taxing power as certainly as any other.

It was against the arbitrary exercise of the taxing power that both the English people and the American colonies made their earliest and most vigorous claims to the protection of the law of the land.

See Magna Charta;
The Petition of Rights, 1 Car., I c. 1;
Bill of Right, 1 W. & M. sess. 2 c. 2;
Stamp Act;
Journal of Congress, vol. 1, p. 28, Ed. Phil., 1800;
Ordinance of 1787, Art. 4;
Journal Confederate Congress, vol. XII, p. 58;
2 Coke Inst., p. 46;
4 Black. Com., 424;
Cooley Const. Lim., 35, 429, 599, 605, 606, 610, 612, 615, 617, 635, 638;
2 Kent. Com. (11th Ed.), 3 note, 6;
McCullough v. *State of Maryland*, 4 Wheat., 316, 427;
Freeland v. *Hastings*, 10 Allen, 570, 575;
The Railroad Tax Cases, 13 Fed., 722, 734, 751, 757, 764.

In the last cited case, at page 733, Mr. Justice Field said of the control of the Federal constitution over the State power of taxation:

"Unequal exactions in every form, under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws when arbitrary and unequal tax is permissible; when different persons may be taxed on their property of the same kind, similarly situated at different rates."

Mr. Sawyer, C. J., in his concurring opinion in this case, page 763, quoted and approved the following from *Stewart* v. *Palmer*, 74 N. Y., 183:

"The legislature can no more arbitrarily impose an assessment for which property may be taken or sold than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these without due process of law, has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done. 'Due process of law' is not confined to any judicial proceedings, but extends to every case which may deprive a citizen of his life, liberty or property, whether the proceedings be judicial, administrative or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"No case, it is believed, can be found in which it was decided that the constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him.

"It is a principle which underlies all forms of government by laws that a citizen shall not be deprived of life, liberty or property without due process of law. The legislature has no power to take away any man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time, place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature."

The Circuit Judge further says:

"In *Cooper* v. *Board of Works*, 108 Eng., C. L. R., 181, in which was in question the action of the board of public works in pursuance of a statute which did not require notice, Willes, J., said: 'I apprehend that a tribunal, which is by law invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principle of justice.' In the same case, Byles, J., said: 'The judgment of Mr. Justice Fortescue, in *Dr. Bentley's Case*, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says: 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he called upon him to make his defense. 'Adam, where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?'"

"In *Davidson* v. *New Orleans*, 96 U. S., 97, it was not questioned, but assumed, that the party taxed must have an opportunity to be heard, and decided upon that theory. In my judgment the authorities establish beyond all controversy that somewhere in the process of assessing a tax under a law, or a State constitution, at some point before the amount of the assessment becomes finally and irrevocably fixed, the statute or the State constitution must provide for notice to be given to the owner of the property taxed, and an opportunity be afforded to make objections and to be heard upon them. In some form or manner he must be afforded an opportunity to defend his interests. In this case the constitution makes no provision for notice or a hearing, and the answer alleges that there was none, which is admitted by the demurrer."

See *Hagar* v. *Reclamation District No. 108*, 111 U. S., 701, 708 and 710, and notes on pages 712 and 713.

In this case Mr. Justice Field said:

"It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* v. *California*, 110 U. S., 516, 536.

"But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson* v. *New Orleans:* 'In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvement, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.' Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his

property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by the law and go into business. There is no need in such cases for notice or hearing. So also, if taxes are imposed in the shape of license for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision of equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

In a case somewhat like this one, a writ of error to the Supreme Court of Pennsylvania was dismissed for the reason that "ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction upon an appeal

to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution." *Pearson* v. *Yewdall*, 95 U. S., 294.

In the late case of *Klein* v. *Nugent Gravel Co*, 66 N. E., 486, the Appellate Court of Indiana held a complaint to foreclose a street improvement lien insufficient because the assessment was arbitrarily levied by the town officers. The court said:

"The authority of a city to improve streets and levy assessments against abutting real estate for the payment of such improvements, is conferred by statute and the general rule prevails that the provisions of the statute should be followed. The right of a municipality to lay a burden upon private property for a public improvement rests upon the theory that such property thereby derives a benefit equal to the burden imposed. Cooley on Taxation (2d Ed.,) 674; *Jones Co.* v. *Perry*, 26 Ind., App., 554, 57 N. E., 583. It is both the spirit and letter of the law that all property abutting upon a street improved shall bear its proportionate burden of the costs, according to the benefits accruing. The statute never intended to place within the arbitrary power of a city council the right to assess lots and parcels of land fronting or abutting on one side of a street to the exclusion of lots on the opposite side and thus place the burden of the costs of the improvements wholly upon property upon one side. The costs of the improvement assessed against a lot on one side might not be the same as that assessed against a lot on the opposite side for the reason that the benefits accruing might not be equal."

Plaintiff in error is not relying upon a guaranty of the Federal Constitution that the assessments upon her lots shall be levied upon the basis of frontage, area, value, or of actual special benefits, but upon a guaranty of the Federal Constitution that the assessments upon her lots shall not be levied by an exercise of arbitrary power. She does not ask this court to hold that the assessment upon her property is void because levied upon a rigid frontage basis, although she con-

ceives that the court might readily extend the constitutional guaranty thus far, but she does ask this court to hold void the assessments arbitrarily levied by the town board of trustees, in a method not authorized or directed by any state law. The situation is the same as if the statute required assessments to be made upon the frontage basis, and the board of trustees had made the assessment upon the basis of area.

We suggest in this connection that the assessment was not only arbitrarily made, but that the statute provided for an arbitrary assessment, not according to "the law of the land," as generally recognized by the courts and the legislatures.

First. The statute gives to the board of town trustees exclusive judicial power, thus violating the fundamental principle of republican government that the three departments of government shall be kept separate.

Cooley Const. Lim. (6th Ed.), 104;
People v. *Chase*, 165 Ill., 527
(Torren's Land Law Case);
State v. *Guilbert*, 56 Ohio St., 575;
Ex parte Logan Branch Bank, 1 Ohio St., 432;
Whitcomb Case, 120 Mass., 118;
Sanborn v. *Fellows*, 22 N. H., 473;
Langenberg v. *Decker*, 131 Ind., 471;
State v. *Noble*, 118 Ind., 350, 366, 370.

As to the right of a board of equalization to increase a valuation without specific notice, the court said, in the case of *Kuntz* v. *Sumption*, 117 Ind., 1, in denying the right: "Judicial powers are, as we have said, in the case cited (*Wilkins* v. *State*, 113 Ind., 514), lodged in courts and when the constitution distributes the judicial power, it can only be exercised by the tribunals named by the constitution and constituted as the constitution provides." (Citing cases.)

It has been held that the legislature could confer upon the board of trustees the power to make the assessments for street improvements. But that was under the old front foot

rule. This might have been due process of law when the duties of the trustees were judicial in form rather than in substance; but under the rule of actual benefits their duties are eminently judicial, both in form and substance, and their hearing does not afford due process of law.

It has also been held that a surveyor or trustee, a board of trustees or of commissioners, may make a provisional or contingent assessment of actual special benefits, but with the exception of the Barrett law, no statute or decision in Indiana attempts to make an assessment of actual special benefits final and conclusive until made or reviewed fully by a properly and legally constituted judicial tribunal acting according to the regular forms of judicial procedure, including the rights of change of venue and of appeal. These are rightly held to afford due process of law.

If the assessment is a judicial function, it cannot be made by either legislative or the executive department of government, nor by any branch of either. The board of town trustees is primarily a legislative body. The legislature may confer upon it certain functions of a judicial or *quasi* judicial character. It cannot, however, confer upon the town board duties of a purely judicial character and make the board's determination final and conclusive.

Second. The hearing granted by the statute does not afford "such safeguards for the protection of individual rights" as are "prescribed for the class of cases to which the one in question belongs" in Indiana.

In all other cases in Indiana where actual benefits or damages are to be determined, an appeal lies to the Circuit or Superior Court upon that question. In this case there is no appeal. In other cases, with very few exceptions, provision is made for securing a disinterested tribunal to determine the question in the first instance.

For illustrations, see the following sections of the Revised Statutes of Indiana, 1894:

Sec. 893, *et seq.*, for writ of assessment of damages.

Sec. 3582, *et seq.*, for harbor improvements.

Sec. 3597, *et seq.*, for sewer outlets.

Sec. 3607, for levees in cities.

Sec. 3629, *et seq.*, for opening, laying out or altering a street, alley, highway or water course.

Sec. 3834, *et seq.*, for condemnation of property in cities.

Sec. 3967, *et seq.*, for condemnation of property in cities of 50,000.

Sec. 4121, *et seq.*, for condemnation of property in cities of 35,000.

Sec. 4250, *et seq.*, for water works in cities and towns.

Sec. 4307, *et seq.*, for parks in cities and towns.

Sec. 4405, *et seq.*, for opening streets in towns.

Sec. 4429, *et seq.*, for sewers in towns. (There is no provision for an appeal, but in Section 4437 it is provided that in actions to enforce the lien the amount of actual benefits may be contested.)

Sec. 4646, *et seq.*, for property taken by bridge company.

Sec. 4704, *et seq.*, for cemeteries.

Sec. 4759, for right of way for gravel roads.

Sec. 4760, for material for gravel roads.

Sec. 4833, *et seq.*, for land taken by hydraulic company.

Sec. 5083, for land taken by canal company.

Sec. 5090, for land taken by water company.

Sec. 5105, for land taken by oil or gas company.

Sec. 5160, for land taken by railroad company.

Sec. 5274, for land taken by lateral railroad.

Sec. 5284, for land taken for extension of railroad.

Sec. 5417, for land taken by slack water navigation company.

Sec. 5436, for damming water course.

Sec. 5454, for land taken by street railroad.

Sec. 5501, for lands taken by telegraph companies.

Sec. 5523, for lands taken by telephone companies.

Sec. 5622, *et seq.*, for drainage.
Sec. 5631, for repairs of drains.
Sec. 5632, for allotment of drains for repairs.
Sec. 5655, *et seq.*, for drainage.
Sec. 5690, *et seq.*, for drainage.
Sec. 6555, *et seq.*, for taking up estrays.
Sec. 6610, for land taken for a ferry.
Sec. 6754, for opening highways.
Sec. 6807, for highways between counties.
Sec. 6830, for land damaged by improving highway.
Sec. 6865, for land taken for free turnpike.
Sec. 6869, for material taken to repair gravel road.
Sec. 6680, *et seq.*, for free gravel roads.
Sec. 6913, for material taken to build free pike.
Sec. 7216, *et seq.*, for levees and dykes.

Fourth. Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States requires that no man shall be judge in his own cause.

An explanation of the injustice of the assessment upon the land and lots of plaintiff in error and of the arbitrary action of the board of trustees in making the assessments is found in the fact alleged in the answers and cross-complaints (Rec. pp. 26, 28, 47, 51), that all the five members of the board of trustees that made the assessments were resident taxpayers of the town and as such interested in having the entire cost paid by the abutting property owners, thereby relieving the town from any part of the cost, and in the further fact, so alleged, that Hilton U. Brown owned 1020 feet (Rec. pp. 21, 22, 44), and that J. C. Barnhill owned 60 feet on the same street, assessed at the same time at the same rate for the same improvement, and that Brown and Barnhill were members of the committee of three to which the engineer's estimate was referred (Rec. pp. 23, 45), and as such joined in the

report recommending that said estimate be approved, and that said Brown and Barnhill were members of the town board of trustees, Brown being President thereof (Rec. pp. 16, 41), and as such trustees aided and had a part in approving said report, aided and had a part in refusing to plaintiff in error and the other property owners a hearing upon the question of actual special benefits, and aided and had a part in arbitrarily disregarding the State laws, and assessing an arbitrary sum upon the property of plaintiff in error, greatly in excess of the actual benefits, and as such aided and had a part in confiscating the whole of lot 60, and a substantial part of the other lands and lots of plaintiff in error.

Plaintiff in error does not claim that the Federal guaranty of due process of law will not permit a board of town trustees to apportion and determine the special benefits of a local assessment. She claims only that the special benefits must be apportioned and determined by due process of law; that in fixing the forms of due process of law the legislature must have regard to certain established and recognized maxims of right that are guaranteed by the Federal Constitution; that one of these well recognized maxims is that no man shall be a judge in his own cause. This maxim is older than the English government, and was well recognized by the colonies before the adoption of the Constitution. It is essential to due process of law. It is crystallized in the old maxims of the law.

"*Aliquis non debet esse judex in propria causa, quia non potest esse judex et pars.*"

Coke, Litt., 141, a;
Broom. Max. (8 Am. Ed). 116;
Littleton, § 212;

Nemo debet esse judex in propria causa.
Earl of Derby's Case, 12 Coke, 114;
Broom. Max. (8 Am. Ed). 116;

Nemo potest esse simul actor et judex.
Broom. Max. (8 Am. Ed.) 116.

Nemo sibi esse judex vel suis jus dicere debet.
Earl of Derby's Case, 12 Coke, 114;
Cod. 3, 5, 1.
Broom. Max. (8 Am. Ed.) 116.

Because, *Nemo agit in seipsum.*
Jenk. Cent. Cas., 40.

For the authorities upon this proposition, see list cited on page 19 of this brief.

"*Si alter ex litigatoribus judicem solum heredem, vel ex parte fecerit, alius judex necessario summundus est; quia iniquum est, aliquem suae rei judicem fieri.*"

Pandects, pars, II, lib. 5, 17.

Which may be freely translated: If either of the litigants, or a party, shall have made a judge his sole heir, another judge is necessarily summoned, because it is abhorrent that any one should be judge in his own cause.

Mr. Cooley, in his work on *Constitutional Limitations*, at page 506 (6th Ed.), says:

"No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule that Lord Coke has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia*, and they are *leges legum*.'

"This maxim applies in all cases where judicial functions are to be executed, and excludes all who are interested, however remotely, from taking part in their exercise. * * * It is not left to the discretion of the judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the

cause. * * * Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord Campbell observing: 'It is of the last importance that the maxim that 'no man is to be judge in his own cause' should be held sacred. And that is not to be confined to the cause in which he is a party, but applies to a cause in which he has an interest.' We have again and again set aside proceedings in inferior tribunals because an individual who had an interest in the cause took part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree on that account, was a decree not according to law, and was set aside."

The language above quoted by Lord Campbell was used in the case of *Dimes* v. *Grand Junction Canal*, 3 H. L. C., 759, 793.

As to the due process of law referred to in the Fourteenth Amendment, Mr. Justice Field, in *Pennoyer* v. *Neff*, 95 U. S., 714, 733, said:

"Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."

In *Calder* v. *Bull*, 3 Dall., 386, 388, Mr. Justice Chase said:

"There are acts which the Federal, or State Legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property for the protection whereof the government was established. An Act of the legislature (for I can not call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they can not change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property."

It is not contended that the Federal guaranty will make void every local assessment made by a board of town trustees having such a direct pecuniary interest in the cause. In fixing the law of the land the legislature must have regard for

the constitutional maxim as applied to all the circumstances of the matter in hand. In *Campbell* v. *Dwiggins* (83 Ind., 473), the Supreme Court of Indiana held unconstitutional a statute regulating assessments for the repair of ditches and drains, saying:

"Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this."

The circumstances of the present case are substantially as follows: The cost of this improvement was to be assessed upon the abutting property according to the actual special benefits, and this amount upon each piece of property was to be judicially determined after hearing and upon the basis of such proof as the owners might offer.

Adams v. *City of Shelbyville*, 154 Ind., 467.

The judgment of the town board making the assessment was absolute, final and conclusive. There was no appeal from their judgment as to the amount, and its accuracy could not be questioned or the amount altered in any other tribunal.

Klein v. *Tuhey*, 13 Ind. App., 74;
Chicago & E. R. Co. v. *City of Huntington*, 149 Ind., 518.

The proceeding prescribed by the State legislature was not "adapted to the nature of the case." It violated the constitutional right to have, at some stage of the proceedings, to levy and collect the assessment, an impartial tribunal, to hear evidence and fix the amount of the assessment. Of what avail is it to regard the constitutional requirement of a hearing and notice thereof, if no constitutional tribunal is provided, and no constitutional hearing had in the individual case?

It does not give plaintiff in error an impartial and constitutional tribunal to provide that Brown and Barnhill should sit as judges to finally hear, weigh and consider the proof offered by the other property owners, and to judicially and finally determine from such proof how much of the cost of the improvement should be borne by the grounds about Brown's home; how much should be borne by Barnhill's comparatively narrow lot in the heart of the town; how much should be borne by Sarah A. Hibben's vacant lots in the suburbs of the town; and how much should be borne by Sarah A. Hibben's cow pasture. For whatever part of the total cost is added to the property of Sarah A. Hibben, is subtracted from the property of Brown and Barnhill and the other owners, and whatever is subtracted from the property of Sarah A. Hibben must be added to the property of Brown and Barnhill and the other property owners.

Adams v. *City of Shelbyville*, 154 Ind., 467.

The greater the assessment upon their own lots, the more they must pay; the greater the assessment upon the town and the other lots, the less they must pay; the smaller the assessments upon the town and the other lots, the more they must pay. And the interest of the other three members of the town board was but little less direct and immediate. If the entire cost is assessed against the abutting property, the town will have naught to pay. Every reduction of the assessment upon abutters means a corresponding increase of the assessment of the town. Every increase of appellant's assessment means a corresponding decrease in the assessment upon the other abutters or the town. The assessment upon the town is paid by a tax levy. As citizens and tax payers, these three must pay a portion. As reasonable, sensible men, they know this. Might or might not this knowledge influence them when they come to make the assessments? Not necessarily to a dishonest intent to escape a just obligation, but to an unconscious bias, the more dangerous because more subtle.

"But Och! Mankind is unco weak;
And little to be trusted;
If self the wavering balance shake,
It's rarely right adjusted."

It makes them judges in their own cause.

This interest would not so much affect the correctness of the assessment if the law required it to be made upon a rigid and arbitrary basis of frontage or area. It would then be a question of mathematical calculation. This was substantially the holding of the Supreme Court of Indiana in the case of *Garvin* v. *Daussman*, 114 Ind., 429, before quoted from. But Indiana adopted a new rule in 1889 and under it the assessment is a judgment after hearing, and the pecuniary interest of the judges makes void the judgment.

In Michigan, the State Constitution required that the benefits and damages of opening an alley should be fixed by a jury, and in *Paul* v. *Detroit*, 32 Mich., 108, at page 117, the court said:

"In immediate connection with this appears a provision which is fatally objectionable. In these proceedings, as explained in *People* v. *Brighton*, and some of the other cases cited, the city of Detroit is a mere party litigant and subject to all the conditions belonging to parties. If there is any one principle relating to juries which cannot safely be disregarded, it is the rule which requires them to be absolutely free from the influence of any party on whose affairs they are to act. The attorney stands in the same disability with the party, and no trial or hearing can be impartial where either party or counsel can exercise any function beyond what is done in open court in all controversies by the parties and their agents. This charter retains the old theory, that this proceeding is a city proceeding, and not a judicial one, and declares that the 'city attorney shall give said jury legal advice and counsel concerning their duties whenever requested.' (Sec. 5.) And that when they have agreed on a verdict, he shall draw it up in the form of a report for their

signature. Sec. 6. This contemplates relations which are illegal and grossly improper, and which can only be explained on the idea that the jury is no jury, and is but a subordinate committee of the council. There may be cases were inquests are provisional, and not conclusive (as in the case of grand juries), where advice of counsel may be allowable to a certain extent. But there is no case of a jury deciding upon rights finally, where such a course has ever been tolerated. It is in violation of the simplest rules of justice, and amounts to *embracery*. Bacon's Ab. 'Jury,' M. 3."

In the case of *Diveny* v. *City of Elmira*, 51 N. Y., 506, the Court of Appeals decided that a resident and a taxpaper of a city was not competent to sit as a juror in a suit against the city for damages for personal injury.

A statute of Michigan sought to give a company certain rights to regulate floating of logs in streams, and to sell logs to pay their charges. Held, in *Ames* v. *Port Huron Log Driving and Booming Co.*, 11 Mich., 139, that the act was unconstitutional, because it took the property of the citizen without giving him a hearing before an impartial tribunal. Because it made the company a judge in its own case.

A Maine statute provided that on appeal from the decision of the county commissioners on petitions for laying, altering, or discontinuing a highway, the Court should appoint a committee of three persons. Held, in the case of *Clifford* v. *York Co. Com.*, 59 Me., 262, that a brother of one of the petitioners was incompetent, and that exceptions should be sustained to their report.

In the case of *State et al.* v. *Crane*, 36 N. J. L., 394, the law provided for the assessment of benefits and damages for opening and improving South Avenue by a board of commissioners, consisting of five persons, freeholders and residents. One commissioner named Hammer, was assessed $50.00 benefits. The complainant was allowed $900.00 damages. The legislature attempted to make such assessments valid by enacting

that if a majority of the commissioners were competent the assessment should be valid. The Supreme Court set aside the assessment saying:

"The fact of his interest is undoubted; what, then, is the effect of it? To make assessments for improvements of this kind requires action of a judicial nature. *State* v. *Newark*, 1 Dutcher, 405. And one of the fundamental maxims of the law is, that no man can be a judge in his own cause. So tenaciously was this adhered to in our State, that the Court of Errors, in *Peck* v. *Freeholders of Essex*, 1 Zab., 656, held that the then Chief Justice of this Court was disqualified from sitting in a cause, by reason of his being an inhabitant, freeholder and tax payer in the County of Essex, and, therefore, interested in a suit to recover money for the county." * * * "The maxim is inherent in and a part of the nature of judicial action, and although in many matters the legislature may provide for the exercise of judicial functions, and designate the persons who shall exercise them, yet it cannot in so doing lose sight of the essential character of judicial action, and authorize or sanction a judgment through instrumentalities contrary to the innate and universally recognized sense of natural justice. In such a case the power conferred would not be judicial; it would be tyrannical."

In the case of *Washington Ins. Co.* v. *Price*, Hopk. Ch. 1, Chanceller Sanford refused to hear the case, because he was a stockholder in the appellant company, holding that he was disqualified by interest. He said:

"Though the principle that a party can never act as judge is not declared by our Constitution or statutes, yet as it is a maxim of universal justice and is undoubted law in England, it exists here as it exists there, a rule of the common law. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question he has no authority to determine the cause."

In the case of *The Queen* v. *Cheltenham Com.*, 1 A. & E. N. S, 468, a paving act empowered commissioners to lay rates, giving to parties aggrieved an appeal to the quarter sessions, whose order was to be final; on appeal against a rate, the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven magistrates to eight, held the evidence admissible; three of the eleven magistrates were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate. Court of Queen's Bench, by all the judges, held the proceeding to be invalid, because of interest.

On a petition to remove an administrator with will annexed because the probate judge who made the appointment was the brother-in-law of the administrator and son-in-law of the principal creditor of the estate, the petition was sustained because the judge was disqualified by interest. The court said in *Hall* v. *Thayer*, 105 Mass., 219:

"The defect is incurable. It does not depend upon the motives with which the judge acted. No wrong motives are imputed to the judge in this case. But it is said by Chief Justice Shaw, in *Gay* v. *Minot*, 3 Cush., 352, 354, that the case being *coram non judice*, the first probate was not voidable merely, but void, incapable of being made good by confirmation, waiver or ratification on the part of those interested. The same is true as to county commissioners. *Tolland* v. *County Commissioners*, 13 Gray, 12."

In proceedings to lay out and open a highway, the president of the board of commissioners was a brother of the wife of the chief petitioner for the highway. Chapman, C. J., in *Taylor* v. *County Com. of Worcester*, 105 Mass., 225, said:

"As one of the county commissioners was a brother-in-law of Bullard, over whose land the highway was located, and who was entitled to damages, the proceeding was *coram*

non judice and utterly void, and no subsequent waiver, consent or release could render it valid. *Hall* v. *Thayer*, *ante*, 219."

The question of what amounts to due process of law and the effect of interest of the judge was fully discussed in an opinion by the United States Court for the Northern District of Ohio, in *Myers* v. *Shields*, 61 Fed., 713, 723, an action to enjoin the collection of certain taxes. The auditor of the county claimed that the complainant's testate had fraudulently withheld certain property from taxation, and the auditor thereupon, according to the statute of Ohio, added the amount so claimed to be omitted, together with penalty, and certified it to the treasurer for collection. The court reviews the authorities at length and holds that the proceedings did not afford the citizen due process of law, *first*, because there was not a judicial hearing, and, *second*, because the statute gave the auditor a per cent. of the amount so collected, and hence his interest disqualified him as judge to determine that the property had been fraudulently withheld. The court quoted and approved other cases as follows:

"In *Pearce* v. *Atwood*, 13 Mass., 324, Chief Justice Parker said: 'It is very certain that by the principles of natural justice and of the common law no man can lawfully sit as a judge in a case in which he may have pecuniary interest. Any interest, however small, has been held to render a judge incompetent.'

"Lord Campbell said, in *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas., 759:

"'It is of the last importance that the maxim that no man is to be a judge in his own case should be held sacred, and that it is not to be confined to a cause in which he is a party, but applies to any cause in which he has an interest. We have again and again set aside proceedings because an individual who had an interest took part in the decision.'

"If one of the judges of a court is disqualified on this ground, the judgment will be void, even though the proper

number may have concurred without the disqualified judge. *Queen* v. *Justices of Hertfordshire*, 6 Q. B., 753; *Railroad Co.* v. *Howard*, 20 Mich., 18. The legislative voice has spoken in equally positive inhibitions against interested persons acting as judges, appraisers, road viewers or commissioners. In Ohio statutory provisions are in force, allowing a change of venue of the suit upon the mere affidavit of the parties of prejudice, bias or interest. * * * *Cooley Const. Lim.*, 410, 411, thus states the rule: 'No one ought to be a judge in his own case. This maxim applies in all cases when judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and, when his own rights are in question, he has no authority to determine the case.'

"It is no sufficient answer to these statutory and judicial expositions of the maxims of the law to say that in most of the cases cited the legislature has recognized the disqualification of the judges, appraisers, assessors and commissioners, because of their interest, and provided they should not act when so interested; but in the case of the auditors it has empowered them to act notwithstand their interest, and this policy was necessary to make efficient the revenue laws of the State. But it is not within the power of the legislature to make any process which it may deem necessary or essential, even for the collection of public revenue, 'due process of law,' within the meaning of the Federal Constitution."

To the same effect are the late cases of *Brinkerhoff* v. *Brumfield*, 94 Fed. Rep., 423, and *Aultman & Taylor Co.* v. *Brumfield*, 94 Fed. Rep., 423.

White v. *Connelly*, 105 N. C., 65, decided that a deed was invalid when the grantor, a clerk of the Superior Court, in the exercise of a judicial function, passed upon the sufficiency of the acknowledgment by a justice.

In *Wetzel* v. *State*, 5 Tex. Civ. App., 17, a judgment dissolving a city and enjoining the collection of taxes was de-

cared void and set aside because the judge was a taxpayer of the city. The Court said: "A pecuniary interest in the result of a suit disqualifies a district judge, both at common law and under our Constitution and statute."

Sanborn v. *Fellows*, 22 N. H., 473, was an action to recover defendant's portion of the cost of a partition fence established by fence viewers of the town. One of the viewers was uncle of the plaintiff. Held that the proceedings "were *coram non judice* and void." The Court said:

"The duties of fence viewers we think of a character chiefly judicial. It is not necessary that a magistrate or board should act formally as a court, or that they should be usually so denominated or considered. If they are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial. * * * The principle is well settled that wherever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be impeached collaterally, by showing that the court or magistrates have acted in a case where they had no jurisdiction, or by modes of procedure which they are not authorized to adopt."

To the same effect is the case of *Moses* v. *Julian*, 45 N. H., 52, and *Stearns* v. *Wright*, 51 N. H., 600.

In *Bradley* v. *City of Frankfort*, 99 Ind., 417, the Supreme Court said:

"That all parties whose lands are to be assessed or who are in any way to be affected by the proceedings have the right to demand that the commissioners shall be impartial, is apparent to any one."

The above case was an appeal from a proceeding of the City of Frankfort to open and extend a street. The street commissioner was held to be disqualified because his son-in-

law owned property along the street. It was also held that in-as-much as Section 3167 provided for the appointment of a commissioner *pro tempore* in case the regular commissioner was disqualified, the objection was waived by a property owner having actual notice of the disqualifying interest who failed to object on the hearing before the Common Council.

But in the case at bar the legislature has made no provision for a disqualifying interest. The failure of the legislature to provide against the contingency of the tribunal being disqualified by interest will not give the judge the right to decide when so disqualified.

Washington Ins. Co. v. *Price*, 1 Hopk., Ch., 2;
Ames v. *Port Huron Log-Driving and Booming Co.*, 11 Mich., 139;
Meyers v. *Shields*, 61 Fed., 713–729;
Sanborn v. *Fellows*, 22 N. H., 473.

In *Markley* v. *Rudy*, 115 Ind., 533, the Supreme Court said: "It is a fundamental rule in the administration of justice that no person can be judge in a cause in which he is interested. This rule applies to inferior tribunals as well as to courts of general and appellate jurisdiction. This elementary principle has been so long and so universally recognized that it has become an accepted legal maxim. Broom, Legal Maxims, 116."

The above case was an appeal from an assessment by a surveyor for repairs of a ditch under Section 10 of the Act of 1885 (page 141). Judgment against the surveyor was affirmed, because he owned real estate benefited by the repairs.

In *Pearcy* v. *Michigan Mut. Life Ins. Co.*, 111 Ind., 59, the Court granted a new trial because one of the jurors had taken out a policy on his own life in appellee company, payable to his wife, and failed to disclose this fact on his *voir dire*. The Court cited and approved *Diveny* v. *City of Elmira*

supra, and said: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependant not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice or interest of the jury."

In *Chicago & Atlanta Ry. Co.* v. *Summers*, 113 Ind., 10, appellee brought suit on a judgment rendered in his favor by a justice of the peace who was, at the time, appellee's attorney. Judgment was reversed, the court saying:

"We are of opinion that the facts stated in such answer are amply sufficient to constitute a good defense in bar of appellee's suit or proceeding, and to show, if sustained by the evidence, that the justice's judgment, mentioned in the motion or complaint herein, was and is absolutely null and void. Such a judgment appellant had the right to attack and impeach whenever and however it was sought to be enforced. If, at the time his action against appellant was pending before the first justice, appellee in person had been a qualified and acting justice of the peace of Starke County, and if, when the change of venue was granted, the action had been sent to appellee, as such justice, and he had tried and decided the case, and had rendered and entered judgment therein in his own favor and against appellant, no one could doubt that such judgment was wholly void and could not be enforced; for such a judgment would be in direct violation of the old and well-known legal maxim, namely, *Nemo debet esse Judex in propria sua causa.* Broom Leg. Max., p. 116."

"In legal effect, however, under the averments of appellant's answer herein, the justice's judgment, the payment of which is sought to be enforced in this suit or proceeding, was rendered by the judgment plaintiff, appellee herein, in *propria sua causa.* For it is averred in such answer that the justice of the peace, to whom the action was sent on change of venue, was 'still acting as the attorney for the plaintiff, and not otherwise,' at the time he rendered such judgment in the aforesaid action. If the fact so averred be true, the justice's judgment was unquestionably void."

In the case of *Bass* v. *City of Ft. Wayne*, 121 Ind., 389, an injunction was asked to prevent the City of Fort Wayne from making certain water contracts, alleging that the statute was unconstitutional because it permitted the city council, composed of citizens and taxpayers, to appoint the commissioners to assess the damages. The court said: "We are satisfied that a property owner has a right to have his damages assessed by disinterested persons at some stage of the proceedings prior to a final judgment. *Bradley* v. *City of Frankfort.*" The court held the statute was constitutional because an appeal was allowed. This was in accord with the opinion in *Sanborn* v. *Fellows*, *supra*.

To the same effect is the case of *Board of Com. of Carroll Co.* v. *Justice*, 133 Ind., 89, which was a proceeding to declare void the proceedings of the Board of Commissioners establishing a free gravel road and to enjoin the making of assessments because one of the commissioners owned lands subject to assessment. The commissioners appointed the viewers to make the assesments. The court held that such a decision was voidable and not void, and not open to collateral attack by way of injunction. The court said:

"The maxim that no man should be a judge in his own case is so well established, both in reason and by authority, that it needs neither argument nor the citation of adjudged cases in its support. The effect to be given an adjudication rendered by a disqualified tribunal is another and more troublesome question."

* * * "If no provision had been made in the statute for notice to the land owners affected, at some stage of the proceeding, or opportunity given by appeal, of having their case tried by a duly constituted and impartial tribunal, the remedy by injunction would doubtless be opened to the appellee."

No amount of judicial or logical refinement will convince man that one can justly and honestly hear and weigh evidence in his own case and decide thereon against his own in-

terest. The form of the proceeding is immaterial If the duty to be exercised is of such a judicial character that under the influence of his interest in the subject-matter the judge may so decide as to give to himself an unjust or inequitable advantage and perforce impose upon other parties a corresponding inequity or disadvantage, it is a case where the constitutional guaranty of due process of law is applicable.

North Bloomfield G. M. Co. v. *Keyser*, 58 Cal., 315;
Heilbron v. *Campbell*, 23 Pac. Rep., 122;
Meyer v. *City of San Diego*, 121 Cal., 102;
Inhabitants of North Hampton v. *Smith*, 11 Metc. (Mass.), 390;
Taylor v. *Williams*, 26 Tex., 583;

It has been decided that a taxpayer is disqualified by the common law from acting as judge, juror or commissioner in a case where a part of the assessment for local improvements will come out of the general treasury, but that the legislature may by statute remove this disqualification, or the Court may remove it in case the legislature has provided no other tribunal, to prevent a total failure of jurisdiction. But it is held that when the judge, juror or commissioner is directly interested by reason of being individually liable to pay an assessment, neither the legislature nor the courts can remove the disqualification. That it is fixed by a fundamental constitutional principle.

In *Meyer* v. *City of San Diego*, 121 Cal., 102, it was held that a judge who was a resident and taxpayer of the town was disqualified by interest in an action to declare illegal and void a contract with a water company, involving the expenditure of a large sum of money by the town. The court said that the disqualification of a judge does not spring from the fact that the judge is a citizen, inhabitant and taxpayer of the city, but from the circumstance that he owns property within

the city which may or may not be liable to taxation as he may decide. The authorities agree that in such a case the citizen and taxpayer is disqualified.

Meyer v. *San Diego*, 121 Cal., 102;
City of Oakland v. *Oakland Water Front Co.*, 118 Cal., 249;
State v. *Young*, 31 Fla., 594;
Peck v. *Freeholders of Essex*, 21 N. J. L., 656;
Ex parte Harris, 26 Fla., 77 (23 Am. St. Rep., 548);
City of Guthrie v. *Shaffer*, 7 Okl., 459;
Austin v. *Nalle*, 85 Tex., 520;
Wetzel v. *State*, 5 Tex. Civ. App., 17;
State v. *City of Cisco* (Tex. Civ.), 33 S. W. Rep., 244;
Jefferson Co. etc. v. *Milwaukee Co. etc.*, 20 Wis., 139.

The disqualification is applicable to all officers and boards whose duties are judicial.

Elliott on Munic. Corporations, § 130;
Markley v. *Rudy*, 115 Ind., 533;
Meyer v. *Shields*, 61 Fed. Rep., 713, 723;
Stockwell v. *Township Board of White Lake*, 22 Mich., 341;
Conklin v. *Squire*, 29 Weekly Law Bull., 157.

If the appellee, William C. Smith, had brought suit against the town to determine and collect the cost of paving the street crossings, and all the members of this town board had been on the jury, either plaintiff or defendant could have challenged them for cause, for the reason that they were residents and taxpayers of the town.

Hern v. *City of Greensburg*, 51 Ind., 119;
Board of Com. of Fountain Co. v. *Loeb*, 68 Ind., 29;
Town of Albion v. *Hetrick*, 90 Ind., 545, 549;
City of Goshen v. *England*, 119 Ind., 368;
Gaff v. *State*, 155 Ind., 277.

Jurors are always disqualified because they are not trained to weigh evidence. It is presumed that judges are by training less likely to allow personal considerations to influence their judgments. But the members of this town board were not trained judges, and as to the interest of H. U. Brown and J. C. Barnhill, there is no doubt as to the disqualification. There are no authorities denying the disqualification, and none are needed to support it. Their interest is direct and immediate, and they are absolutely disqualified. Nor is there any question as to the effect of the disqualification. Whether we regard the town board as a jury or as a court sitting *in banc*, the disqualification of the two disqualifies the entire five. To hold otherwise would be to require the plaintiff in error to show what influence these two had upon the final decision. This is manifestly impossible, and to attempt it would require an impracticable inquiry into the method of arriving at the judgment.

Broom Leg. Max., 120;
Freeman on Judg'ts, § 147 (4th Ed.);
14 Vin. Abr., 573, pl. 28;
Oakley v. *Aspinwall*, 3 N. Y., 547;
Hasketh v. *Braddock*, 3 Burr., 1847;
Queen v. *Justices*, 6 Q. B., 753;
Reg. v. *Justices of Surrey*, 21 L. J. M. C., 195;
Esdaile v. *Lund*, 12 M. & W., 734;
Queen v. *Justices of Suffolk*, 18 Q. B., 416;
Reg. v. *Upton St Leonard's*, 10 Q. B., 827 (59 E. C. L. R.);
State v. *Crane*, 36 N. J. L., 394;
Foster v. *Cape May*, 60 N. J. L., 78, 82;
Traction Co. v. *Board of Works*, 56 N. J. L., 431;
Baldwin v. *McArthur*, 17 Barb., 414, 421.
Converse v. *McArthur*, 17 Barb., 410, 411.

Meyers v. *Shields*, 61 Fed., 713.
Dimes v. *Grand Junction Canal*, 3. H. L. Cas., 759, 793;
Peninsula R. R. Co. v. *Howard*, 20 Mich., 18.

It is sometimes suggested that necessity may make it necessary for the legislature to make a man judge in his own case. It has been so held by a few courts. But this is not the necessity of a single case, but is the general and universal necessity that makes the judges "as fair and impartial as the lot of humanity doth permit." For example, if the interest of a taxpayer and resident of a State would disqualify in all suits by or against the State, it would amount to a destruction of jurisdiction in all cases in which the State was a party.

Meyer v. *City of San Diego*, 121 Cal., 102;
Board of Com. of Fountain Co. v. *Loeb*, 68 Ind., 29;
State v. *Crane*, 36 N. J. L., 394, 400;
Moses v. *Julian*, 45 N. H. 52; 84 Am. Dec., 114;
Washington Ins. Co. v. *Price*, Hopk. Ch., 1;
Anonymous, 1 Salk., 396.

Nor is the legislature the final judge of this necessity. It may be suggested that notwithstanding the constitutional guaranty, the legislature may say that in certain specific cases interest does not disqualify. As was said above, it has been decided in a few cases that the disqualification of a resident and taxpayer as a judge may be removed by the legislature. But to say that the legislature is the final judge in all cases of what interest will disqualify, is to utterly repudiate all our constitutions, both written and unwritten, and to leave the citizen at the mercy of every legislative whim and caprice. Such a legislative act is unconstitutional.

Cooley's Const. Lim. (6th Ed.), 506, *et. seq.*;
Conklin v. *Squire*, 29 Weekly Law Bull., 157;
Day v. *Savadge*, Hob., 85;
Hasketh v. *Braddock*, 3 Burr., 1847;

Bonham Case, 8 Coke, 212, 219, 224;
Great Charte v. *Kensington*, 2 Stra., 1173;
State v. *Castleberry*, 23 Ala., 85;
Peck v. *Essex*, 21 N. J. L., 656;
State v. *Crane*, 36 N. J. L., 394;
Chamber v. *Hodges*, 23 Tex., 104.

In these improvement cases we hear a great deal about collateral attack, about void and voidable judgments and about waiving the objections. But all this has nothing to do with this case.

Plaintiff in error has not waived the right to object to the interest of Brown and Barnhill and of all the members of the board for the reason that she never had an opportunity to object. The Barrett Law makes no provision for objecting to the qualifications or competency of the board or of any member for any reason. In *Bradley* v. *City of Frankfort*, 99 Ind., 417, it was held that the right to object to a commissioner was waived by failure to object at a time when another might by law have been appointed in his stead. This is just and right. To say that appellant has waived the right to object to the interest of the member of the board is unjust and wrong—is nonsense. When could she object, and how, and what relief could be given her?

"A party, however, does not waive an objection which he has no opportunity of making."

Shoemaker v. *Smith*, 74 Ind., 71, 75.

It is urged by the defendants in error that this is a collateral attack; that a void judgment may be attacked collaterally; that a voidable judgment cannot be attacked collaterally; that a judgment by an interested tribunal is voidable, not void, and that therefore plaintiff in error cannot attack this judgment collaterally; that her remedy is by direct attack. Her answer is that by the statute nobody except this town

board had any right to make this assessment; that after they decided it wrongly she had no right to appeal from the decision and no right to have the decision reviewed (*Klein* v. *Tuhey*, 13 Ind. App., 74; *Chicago & E. R. Co.* v. *City of Huntington*, 149 Ind., 518); that she had no right to take a change of venue and that the members of the Court had such an interest that it was unreasonable to expect a just and impartial decision, and whether the judgment be void or voidable, whether it be subject to collateral or direct attack, whether this be a collateral or direct attack, is all indifferent to her. It is now or never with plaintiff in error. If this court says that she cannot now in this action object to the assessment made against her lots by Hilton U. Brown and J. C. Barnhill, it is saying that what the constitution forbids to it, the legislature may do; that an act of the legislature forbidden by the constitution is obligatory upon the citizen; that a void act of the legislature is of more commanding force than a guaranty of the constitution; that the Supreme Court of the State is powerless to protect the citizen against the acts of the town board of Irvington, and that the judicial power is helpless before the town board.

But this assessment may be attacked collaterally. In the opinion in this case it is said that "the doctrine seems to be well settled that in order to render a judgment of a Court or other tribunal invested with the power to decide in a matter void, so as to open such judgement to a collateral attack, an absence must be shown of either: First, a legal organization of the tribunal; or, Second, jurisdiction, etc." This first essential was absent in the town board. It was not only not a legal organization, but it was not a constitutional organization. It it were not the last, it could not be the first.

The cases holding that a judgment by an interested tribunal are voidable and not void specifically exempt the judgments of those inferior tribunals from which no appeal or writ of error lies.

Sanborn v. *Fellows*, 22 N. H., 473;
Moses v. *Julian*, 45 N. H., 52;
Stearns v. *Wright*, 51 N. H., 600;
Board of Com. of Carroll Co. v. *Justice*, 133 Ind., 89;
Bass v. *City of Ft. Wayne*, 121 Ind., 389;
Chicago & Atlanta Ry. Co. v. *Summers*, 113 Ind., 10;
Gay v. *Minot*, 3 Cush., 353;
Hall v. *Thayer*, 105 Mass., 219;
Taylor v. *County Com. of Worcester*, 105 Mass., 225;
State v. *Crane*, 36 N. J. L., 394;
Meyers v. *Shields*, 61 Fed. Rep., 713, 723;
Wetzel v. *State*, 5 Tex. Civ. App., 17;
Sanborn v. *Fellows*, 22 N. H., 473;
Donnelly v. *Howard*, 60 Cal., 291;
Galbreath v. *Newton*, 30 Mo. App., 380.

The only reason given for denying the right to collaterally attack the judgment of interested tribunals is that the complaining party should either take a change of venue to an impartial tribunal or attack the judgment directly by appeal or writ of error.

Bradley v. *City of Frankfort*, 99 Ind., 417;
Bass v. *City of Ft. Wayne*, 121 Ind., 389;
Board of Com. of Carroll Co. v. *Justice*, 133 Ind., 89.

If the failure to take advantage of these rights when granted suffice to take away the right to attack collaterally, the failure to grant these rights should in some wise inure to the benefit of plaintiff in error.

"The principle is well settled that whenever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, then the proceedings may be im-

peached collaterally, by showing that the Court or magistrates have acted in a case where they had no jurisdiction, or by modes of procedure which they are not authorized to adopt."

Sanborn v. *Fellows*, 22 N. H., 473.

The contractor should be paid for making the improvement and plaintiff in error should pay her part. She has no hope or desire to escape the payment of her just portion. But it is just as bad for plaintiff in error to be compelled to pay $1,000 in excess of the benefits as for the contractor to lose $1,000 of the contract price. A statute or an ordinance that does the one is just as repugnant to constitutional right and justice as a statute or ordinance that does the other. Contractor Smith should be paid the entire contract price of the improvement. Plaintiff in error should pay her portion, no more. But she should not be compelled to pay an assessment in substantial excess of the benefits. The authorities following the front foot rule concede that much.

Hadley v. *Dague*, 130 Cal., 207;
Schroder v. *Overman*, 61 Ohio St., 1;
Cleveland v. *Tripp*, 13 R. I., 50;
Lent v. *Tillson*, 72 Cal., 404, 428;
Ramish v. *Hartwell*, 126 Cal., 443.

In *Wight* v. *Davidson*, 181 U. S., 371, the Supreme Court of the United States used this language: "Special facts, showing an abuse or disregard of the law, resulting in actual deprivation of property, may give grounds for applying for relief to a court of equity."

We submit that such "special facts" appear in this case.

Plaintiff in error prays relief at the hands of this Court for the following reasons:

First. The statute is unconstitutional because it does not provide a constitutional tribunal.

Second. The tribunal was unconstitutional because of the interest of the members.

Third. The assessment was unconstitutional,

(*a*) Because of such interest and

(*b*) Because made arbitrarily.

Fourth. Due process of law, as guaranteed by the Federal constitution, is the antithesis of arbitrary action.

Fifth. Due process of law, as guaranteed by the Federal constitution, forbids that any man should be judge in his own cause.

We submit that the judgment of the Supreme Court of Indiana should be reversed.

MURAT W. HOPKINS,
RUSSELL T. MACFALL.
MERRILL MOORES.

Solicitors and of Counsel for Plaintiff in Error.

INDIANAPOLIS, IND., Oct. 1, 1903.

TABLE OF CASES.

PAGES.

Adams *v.* City of Shelbyville, 154 Ind., 467.....15, 21, 24, 56, 57
Ames *v.* Port Huron Log Driving and Booming Co , 11 Mich., 139..21, 59, 65
Anderson *v.* Baker, 98 Ind., 587 .....15, 32
Anonymous, 1 Salk., 396 .....19, 71
Appeal of Nettleton, 28 Conn., 268 20
Aultman & Taylor Co. *v.* Brumfield, 94 Fed., 423..... 22, 63
Austin *v.* Nalle, 85 Tex., 520 ....22, 69
Bagge Case, 11 Rep., 93b, 99a 17, 35
Baldwin *v.* McArthur, 17 Barb., 414, 421..... 70
Bank of Columbia *v.* Okely, 4 Wheat., 235, 244.....18, 36
Barber, etc. Co. *v* Edgerton, 125 Ind , 455..... .....16, 31
Barnett *v.* Ashmore, 5 Wash. St., 163..... 22
Bass *v.* City of Fort Wayne, 121 Ind., 389..... .....21, 67, 74
Block *v.* State, 100 Ind., 357..... 20
Board *v.* Heaston, 144 Ind., 583..... 21
Board of Com. of Carroll Co. *v.* Justice, 133 Ind., 89.....21, 67, 74
Board of Com. of Fountain Co. *v* Loeb, 68 Ind., 29 .....20, 69, 71
Bonham Case, 8 Coke, 212, 219, 224.....19, 72
Bonaker *v.* Evans, 16 Q. B , 162 .....17, 35, 38
Boswell's Case, 6 Rep., 52a.....17, 35
Bradley *v.* City of Frankfort, 99 Ind., 417.....20, 64, 67, 72, 74
Brinkerhoff *v* Brumfield, 94 Fed., 423..... 63
Brown *v.* City of Denver, 7 Col., 305, S C , 3 Am. and Eng. Corp. Cas , 630... 15
Buckingham *v.* Davis, 9 Md., 324 21
Calder *v.* Bull, 3 Dallas, 386, 388.....18, 22, 38, 55
Campbell *v.* Dwiggins, 83 Ind., 473 .....15, 17, 36, 56
Campbell *v.* Board of Com., 118 Ind., 119.....16, 31
Capel *v.* Childs, 2 Cromp. & Jer , 558, 574 .....17, 35, 38
Case *v.* Hoffman, 100 Wis., 314, 351..... 22
Chambers *v.* Hodges, 23 Tex., 104..... .....22, 72
Chicago & Atlanta Ry. Co. *v.* Summers, 113 Ind., 10.....21, 66, 74
Chicago & E R. Co. *v.* City of Huntington, 159 Ind , 518..... 21, 56, 73
City of Ft. Wayne *v* Cody, 43 Ind., 197..... .....15, 30, 32
City of Goshen *v.* England, 119 Ind , 368.....21, 69
City of Guthrie *v.* Shaffer, 7 Okla., 459..... .....22, 69
City of Indianapolis *v.* Holt, 155 Ind., 222, 240.....15, 25
City of New Albany *v.* Cook, 29 Ind., 220.....15, 23

PAGES.

City of Oakland *v.* Oakland Water Front Co., 118 Cal., 249.....20, 69
City of Phila. *v.* Miller, 49 Pa. St., 440..... 16
Cleveland *v.* Tripp, 13 R. I., 50.....22, 75
Clifford *v.* York Co. Com., 59 Me., 262.....21, 59
Conklin *v.* Squire, 29 Weekly Law Bull., 157.....22, 69
Converse *v.* McArthur, 17 Barb., 410, 411.....22, 70
Cooper *v.* Board of Works, 108 E. C. L. R., 181.....17, 44
Davidson *v.* New Orleans, 96 U. S., 97, 104.....18, 36, 44, 45
Day *v.* Savadge, Hob., 85..... 19
DeFrees *v.* Ferstl, 154 Ind., 695, 696.....15, 25
Dewey *v.* DesMoines, 173 U. S., 193.....16, 31
Dimes *v.* Grand Junction Canal, 3 H. L. Cas., 759, 793 .....20, 54, 62, 71
Diveny *v.* City of Elmira, 51 N. Y., 506.....22, 59, 65
Donnelly *v.* Howard, 60 Cal., 291.....20, 74
Earl of Derby's Case, 12 Coke, 114.....19, 52, 53
Edwards *v.* Russell, 21 Wend., 64..... 22
Esdaile *v.* Lund, 12 M. & W., 734.....19, 70
Ex Parte Harris, 26 Fla , 77; S. C , 23, Am. St. Rep., 548.. .....20, 69
Ex Parte Logan Branch Bank, 1 Ohio St., 432.....18, 48
Fechheimer *v.* Washington, 77 Ind., 366..... 20
Findley *v.* Smith, 42 W. Va., 299..... 22
Flournoy *v.* City of Jeffersonville, 17 Ind., 169.....15, 30
Foster *v.* Cape May, 60 N. J. L., 78, 82.....22, 70
French *v* Barber Asphalt Paving Co., 181 U. S , 324.....18, 40
Freeland *v* Hastings, 10 Allen, 570, 575.....18, 42
Gaff *v.* State, 155 Ind., 277.....21, 69
Gay *v.* Minot , 3 Cush., 352, 354.. .....21, 61, 74
Galbreath *v.* Newton, 30 Mo. App , 380.....21, 74
Galpin *v.* Page, 18 Wall.. 350, 368..... .....18, 37
Garvin *v.* Daussman, 114 Ind , 429.. .....16, 27, 32, 58
Gorman *v* State, 157 Ind., 205..... 25
Graham *v.* Furber, 14 C. B., 165 (78 E. C. L. R.).....17, 35
Great Charte *v.* Kensington, 2 Str , 1173.....19, 72
Gregory *v.* Cleveland R. R. Co., 4 O. St , 675.....22
Guckien *v.* Rothrock, 137 Ind., 355.....16, 31
Hadley *v* Dague, 130 Cal., 207.....20, 75
Hagan *v.* Reclamation District No. 108, 111 U. S., 701, 710..16, 18, 32, 36, 44
Hall *v.* Thayer, 105 Mass., 219.....21, 61, 62, 74
Harman *v.* Moore, 112 Ind., 227..... .....16, 32
Harmon *v.* State, 66 Ohio St., 249..... .....18, 36
Harper *v.* Carr, 7 T. R., 266, 270.....17, 35

PAGES.

Hasketh v. Braddock, 3 Burr., 1847.....19, 70
Hawley v. Baldwin, 19 Conn., 585.....20
Heick v. Voight, 110 Ind., 279, 285.....17
Heilbron v. Campbell, 23 Pac. Rep., 122 (Cal.).....20, 68
Hern v. City of Greensburg, 51 Ind., 119.....20, 69
Heydenfeldt v Towns, 27 Ala., 423.....20
Hovey v. Elliott, 167 U. S., 409.....18, 37
Hurtado v. California, 110 U. S., 516, 536.....18, 45
Hudson v. Wood, 52 N. E., 612 (Ind. App).....20
Hughes v. Parker, 148 Ind., 692.....14
Inhabitants of North Hampton v Smith, 11 Metc (Mass.), 390.....21, 68
In re Brook, 16 C. B. N. S., 416 (111 E. C. L. R.).....17, 35
In re Hammersmith Rent Charge, 4 Exch., 97.....17, 35
Jefferson Co. v. Milwaukee Co., 20 Wis., 139.....22, 69
Jenk. 40, Case 76; 90, Case 74.....19, 53
Jones Co. v. Perry, 26 Ind. App., 554.....17, 47
Kirsch v Braun, 153 Ind., 247.....16, 32
Klein v. Nugent Gravel Co. (Ind. App.), 66 N. E., 486.....15, 17, 25, 47
Klein v Tuhey, 13 Ind. App., 74.....20, 56, 73
Kuntz v Sumption, 117 Ind., 1.....16, 18, 31, 48
Langenberg v. Decker, 131 Ind., 471.....18, 48
Leeds v DeFrees, 157 Ind., 392.....15, 25, 26, 32
Lent v Tillson, 72 Cal., 404, 428.....20, 75
Lipes v. Hand, 104 Ind., 503, 507.....17
Marion Bond Co. v. Johnson, 29 Ind. App., 294.....15, 25
Markley v. Rudy, 115 Ind., 533.....21, 65, 69
McCullough v. State of Maryland, 4 Wheat., 316, 427.....18, 42
McKee v. Town of Pendleton, 154 Ind., 652.....15, 25
McVeigh v. United States, 11 Wall., 259.....18, 38
Meyer v. City of San Diego, 121 Cal., 102.....20, 68, 69, 71
Meyers v. Shields, 61 Fed., 713, 723.....16, 22, 30, 62, 65, 69, 71, 74
Moses v. Julian, 45 N. H., 52.....21, 64, 71, 74
Motz v City of Detroit, 18 Mich., 495.....16, 32
Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 272, 284.....16, 18, 32, 40
North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal., 315.....20, 68
Oakley v. Aspinwall, 3 N. Y., 547.....22, 70
Ochus v. Sheldon, 12 Fla., 138.....20
Overing v Foote, 65 N. Y., 263.....16
Paul v. Detroit, 32 Mich., 108, 118.....18, 21, 40, 58
Pearce v. Atwood, 13 Mass., 324.....21, 62

PAGES.

Pearcy *v.* Mich. Mutual Life Ins. Co., 111 Ind., 59.....21, 65
Pearson *v.* Yewdall, 95 U. S., 294.....18, 47
Peck *v.* Freeholders of Essex, 21 N. J. L., 656.....21, 60, 69, 72
Peninsula R. R. Co. *v.* Howard, 20 Mich., 18, 25.....21, 63, 71
Fennoyer *v.* Neff, 95 U. S., 714, 733.....22, 54
People *v* Chase, 165 Ill., 527.....18, 48
Prohibition *del* Roy, 12 Rep., 63.....17, 35
Queen *v.* Com. for Cheltenham, 1 A and E. N. S., 468.....19, 61
Queen *v.* Justices of Hertfordshire, 6 Q B, 753.....19, 63, 70
Queen *v.* Justices of Suffolk, 18 Q B., 416.....20, 70
Railroad Tax Cases, 13 Fed., 722, 734, 751, 755.....18, 36, 42
Ramish *v.* Hartwell, 126 Cal, 443.....20, 75
Ranger *v.* Great Western Ry. Co., 5 H. L. Cas., 72, 88, 89.....20
Reg. *v.* Aberdare Canal Co, 14 Q. B., 853 (68 E. C. L. R).....20
Reg. *v.* Archbishop of Canterbury, 1 E. & E., 559 (102 E. C. L. R.).....17, 35
Regina *v.* Justices, 14 Eng. L. and Eq., 93.....20
Reg. *v.* Justices of Surrey, 21 L. J. M. C., 195.....19, 70
Reg. *v.* Saddler's Co., 10 H. L. Cas, 404.....17, 35
Reg. *v.* Upton St. Leonard's, 10 Q. B., 827 (59 E. C. L. R.).....19, 70
Rex. *v.* Beun, 6 T. R., 198.....17, 35
Rex. *v.* Chancellor of Cambridge (Dr Bentley's Case), 1 Strange, 557..17, 35, 44
Rex. *v.* Geskin, 8 T. R., 209.....17, 35
Russell *v.* Perry, 14 N. H., 152.....21
Sanborn *v.* Fellows, 22 N. H., 473.....18, 21, 48, 64, 65, 67, 74, 75
Santa Clara *v.* Southern Pacific R. R. Co., 13 Am. & Eng. R. R. Cas., 182... 16
Schaefer *v.* Werling, 156 Ind., 704.....15, 25
School Twpt. *v* Irwin, 150 Ind., 12.....16, 32
Schroder *v.* Ehlers, 31 N. J. L., 44.....22
Schroder *v.* Overman, 61 Ohio St., 1.....22, 75
Shank *v.* Smith, 157 Ind., 401.....15, 25
Shoemaker *v* Smith, 74 Ind., 71, 75.....20, 72
State *v.* Castleberry, 23 Ala., 85.....20, 72
State *v.* City of Cisco (Tex Civ.), 33 S. W., 244.....22, 69
State *et al. v.* Crane, 36 N. J. L., 394.....22, 59, 70, 71, 72, 74
State *v* Guilbert, 56 Ohio St., 575.....18, 48
State *v.* Newark, 1 Dutcher, 405.....21, 60
State *v* Noble, 118 Ind., 350, 366, 370.....18, 48
State Tax on Foreign Held Bonds, 15 Wall, 300, 319.....18, 36
State *v* Young, 31 Fla., 594.....20, 69
Stearns *v.* Wright, 51 N. H., 600, 610.....21, 64, 74
Stockwell *v.* Township Board of White Lake, 22 Mich, 341.....21, 69

PAGES.

Stuart *v.* Palmer, 74 N. Y., 183.....16, 18, 28, 32, 42
Sunier *v.* Miller, 105 Ind., 393.....16, 32
Taylor *v.* City of Crawfordsville, 155 Ind., 403, 405.....15, 25
Taylor *v.* County Com of Worcester, 105 Mass., 225.....21, 61, 74
Taylor *v.* Williams, 26 Tex , 583.....22, 68
Templeton *v.* Giddings, 12 S. W. Rep., 851 (Tex.)..... 22
Thomas *v.* Gain, 35 Mich., 155..... 16
Thompson *v.* Goldthwait, 132 Ind., 20.....16, 31
Tolland *v.* County Com., 13 Gray, 12.....21, 61
Town of Albion *v.* Hetrick, 90 Ind., 545, 549.....20, 69
Town of Greenwood *v.* Lawson (Ind.), 64 N. E , 849, 850.....16, 32
Traction Co. *v.* Board of Works, 56 N, J. L., 431..... .....21, 70
Van Ness *v.* Packard, 2 Pet., 137, 144.....18, 41
Washington Ins. Co. *v.* Price, 1 Hopk., Ch. 1.....22, 60, 65, 71
Wetzel *v.* State, 5 Tex. Civ. App., 17.....22, 63, 69, 74
Whitcomb Case, 120 Mass., 118.....18, 48
Whiteford Tp. *v.* Probate Judge, 53 Mich., 130..... 16
White *v.* Connelly, 105 N. C., 65.....22, 63
Wight *v.* Davidson, 181 U. S., 371.....22, 75
Wilkins *v.* State, 113 Ind., 514.....18, 48
Windsor *v.* McVeigh, 93 U. S., 274..... .....18, 38
Wray *v.* Fry, 158 Ind., 92.....15, 25
Zeigler *v.* S. & N. Ala. R. R. Co., 58 Ala., 594.....17, 39
Zimmerman *v.* State, 115 Ind., 129..... 21

TEXT BOOKS AND DOCUMENTS.

PAGES.

Bacon's Abr., "Jury" M., 3.....19, 59
Bill of Rights, 1 W. & M., Sess. 2, c. 2.....16, 42
4 Black. Com., 424.....17, 36, 42
Black on Judgts., §§ 290, 291.....15, 32
Bouvier Law Dict., tit. Judge.....19
1 Brook's Abr., 177, tit. conusans, 27.....19
Broom. Max. (8th Am. Ed.), 116, 120.....17, 19, 35, 52, 53, 65, 66, 70
Burns' Justice, III, 132.....19
Cod , 3, 5, 1.....19, 53
2 Coke Inst., p. 46.....17, 42
Coke, Litt., 141 a, § 212.....19, 52
Com. Dig., 101, 4 Justices, I, 3.....19
Cooley Const. Lim. (6th Ed.), 35, 104, 108, 429,
506, 599.....15, 17, 19, 26, 35, 42, 48, 53, 63
Cooley on Taxation (2d Ed.), 674.....15, 47
Domat Public Law, lib. 2, tit. 1, sec. 2, 14.....19
Elliott on Mun. Corp., § 130.....15, 19, 30, 69
Elliott, Roads and Streets (2d Ed.), §§ 281, 564.....15
Freeman on Judgts. (4th Ed.), §§ 144, 145, 147.....19, 70
Inst., 4 Vol., 71.....19
Journal Confederative Congress, Vol. XII, p. 58.....17, 42
Journal of Congress, Vol. I, p. 28, Ed. Phil., 1800.....17, 42
Just. Code, lib. 1, tit. 1, 16.....19
2 Kent. Com. (11th Ed.), 2, note 3, 6.....17, 36, 42
Littleton, § 212.....19, 52
Magna Charta.....16, 36, 42
Ordinance of 1787, Art. 4.....17, 42
Pandects, pars. II, lib. 5, 17.....19, 53
Petition of Rights, 1 Car. 1, c. 1.....16, 42
Pothier's Pro. Civ. C. 2, sec. 5.....19
Rev. Statutes, Indiana (1894).....49
Rolle, Abr. Judges, Pl., 11.....19
Stamp Act.....17, 42
Story on Const., vol. 2, § 1789.....17, 35
Van Fleet, Coll. Att., § 16.....15, 32
14 Vin. Abr. 573, pl. 28.....19, 70
Voet. Ad. Pand., lib. 5, tit. 1, 43.....19

APPENDIX.

Barrett Law. (Acts 1889, p. 237), Indiana Revised Statutes 1894.

4288. Petitions for Street Improvements—Procedure. 1.

4289. Resolution of necessity—Notice to objectors. 2.

4290. Apportionment of costs—liens—Sale. 3. In all contracts specified in the preceding section the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the cost of any such sewer shall be apportioned among the lands, lots and parts of lots, benefited thereby, and according to such benefits without regard to the assessment for taxation of such property, and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley, or the part thereof to be improved, or of the lots or parts of lots benefited by the construction of such sewer, shall be liable to the city for their proportion of the costs in the ratio of the front line of their lots owned by them to the whole improved line for street and alley improvements, and for the construction of such sewer for the benefit of such lots or parts of lots thereby, and the city or incorporated town shall have a lien upon such lots or parts of lots, respectively, from the time such improvement is ordered, for such costs of improvement, collectible as hereinafter provided, and in all cases where such improvement shall have been made, or may hereafter be made on any street or alley running along or through any unplatted lands lying within the corporate limits of such city or incorporated town, the cost of such improvement shall be estimated according to the whole length of the street or alley, or the part thereof to be improved per running foot, and the owners of such unplatted lands bordering on such street or alley or the part thereof to be improved shall be liable to the contractor for their proportion of their cost, in the ratio of the front lines of such unplatted lands owned by them to the whole improved line; and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands shall be assessed upon

the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement: Provided, however, That where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order. Such assessments, with the interest accruing thereon, shall be a lien upon the property so assessed and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting taxes, and shall not be divested by any judicial sale, and if such city or incorporated town shall fail, neglect or refuse to promptly enforce and collect such assessment when due, the owner or holder of any of the bonds or certificates hereinafter mentioned may foreclose such lien or liens as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of said bonds and interest and all costs, a reasonable attorney's fee. The amount realized by the sale of any such property, or the payment of such assessment after the payment of the costs of such proceeding shall, to the extent of such assessment, with interest thereon, be applied *pro rata* to the payment of the then outstanding bonds or certificates herein mentioned without reference to the time of the maturity of the bonds or certificates. Any mistake in the description of the property or in the name of the owner shall not vitiate the lien of such assessment. Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street and alley crossings, and may order that any part of the total cost of any of the improvement in this act mentioned shall be paid out of the general fund.

4291. Allowance to owner who has improved—Bonds. 4.

4292. Estimates--How paid—Liens. 5. When any such contract shall be made, or shall have been heretofore made, and shall have been in progress of fulfillment, the common council of such city or the board of trustees of such town

shall have power to cause estimates to be made from time to time of the amount of work done by the contractor, and to cause the same to be paid out of the treasury, deducting a reasonable amount of percentage to secure the completion of the contract, until the whole shall be finished, and to prescribe the time in which the whole shall be completed, and such estimates shall be a lien upon the several parcels of ground upon which they are assessed to the same extent that taxes are a lien, and shall have the same preferences over other demands, and such liens shall be in favor of the city or incorporated town and the owner of the certificate or bonds hereinafter mentioned to secure to the city or incorporated town and such owners the reimbursement for such cost of improvements hereinafter provided for. The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all the improvements mentioned in the first section of this act, and repairs of any kinds of streets and alleys to be made in like manner, without such petition, and either charge or cause any or all of the expenses thereof to be assessed and collected, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town.

4293. Final estimate of costs—Report of engineer. 6. When any such improvement has been made and completed according to the terms of the contract therefor made, the common council of such city or the board of trustees of such town shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city or the board of trustees of such town shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching said improvement: First. The total cost of said improvement. Second. The average cost per running foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The

amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground respectively. Sixth. The full description, together with the owner's name, of each lot or parcel of ground bordering on said street so improved. Seventh. In the case of the construction of a sewer, a description of each lot or parcel of lot benefited thereby, together with the owner's name and the fair proportion of the cost of such sewer according to the benefits conferred thereby, that should be assessed against such lot or part of a lot.

4294. Notice of hearing—Assessments—Liens. 7. Upon the filing of the report provided for in the last preceding section, the common council of such city or the board of trustees of such town shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where, a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city or the board of trustees of such town, recommending the adoption or alteration of such report, and the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and the common council of such city or the board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city, or the board of trustees of such town, shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement, which said amounts shall bear interest at the rate of six per cent per annum from the time of the finding of the completion of said improvement by the common council or board of trustees, as mentioned in section 6 of this act. Should any one of such assessments exceed the sum of fifty dollars, then if the owner of the lot or parcel against

which said assessment is made, may, if he, within two weeks after the making of such assessments, shall promise and agree, in writing, to be filed with the clerk of such city or town, and to be spread of record by him in consideration of the right to pay his or their assessment, or respective assessments in installments, that they will not make any objections to illegality or irregularity as to their respective assessments, and will pay the same, with interest thereon, at the rate of not exceeding six per centum per annum, as shall by ordinance or resolution of the common council of such city, or board of trustees of such town, be prescribed and required, he or they shall have the benefit of paying said assessments in ten annual installments, as hereinafter provided. Any owner of any lot who has been assessed more than the sum of fifty dollars thereon for the cost of such improvement who will not promise and agree in writing as herein provided, and all other owners of lots or parcels wherein assessments less than fifty dollars have been made or have heretofore been made against any one lot or parcel, shall be required to pay his or their assessment in full when made, and the same may be collected according to the provisions of amended section 10 of this act, or the contractor or his assigns may foreclose such assessment as a mortgage is foreclosed in any court of competent jurisdiction, and shall recover in addition to the amount of such assessment, with interest, all costs and a reasonable attorney's fee. Whenever any payment shall be made upon any of such assessments, it shall be the duty of the treasurer, contractor or owner of the assessments, bonds or certificates or installments of assessments, as hereinafter provided, receiving such payment, to enter upon the proper record the receipt of such money, and such receipt shall be a discharge of the lien of such assessment to the extent of such payment, and upon the payment of any bonds or certificates as are issued under this act they shall be surrendered to and cancelled by the treasurer; when bonds have been requested as aforesaid, then the common council of such city or the board of trustees of such town shall cause the said assessment amounting to more than fifty dollars and bonds requested therefor to be placed upon the city or incorporated town tax duplicate and charged against the several lots or parcels of ground, as follows: Ten per cent for each successive year

for ten years, to which several amounts shall be added and placed on the duplicate, interest at six per cent per annum, payable semi-annually, which shall be calculated from the time of the acceptance of the work by the common council or board of trustees, until the several allowances fall due; and the first ten per cent shall be due and payable when the first tax falls due and is payable after such assessment is made; and said assessment, as made, together with the interest thereon, shall be a lien upon the several lots or parcels of ground to the same extent that taxes are a lien upon such property, and shall be collectible in the same way that taxes are collectible, or in such manner as the common council or board of trustees by ordinance, shall prescribe; and the law governing the collection of taxes shall, so far as the same is applicable, regulate and govern the collection of such assessment, and such assessment, and the proceeds arising therefrom, shall constitute a special fund for the payment of the costs of such street, alley or sewer improvement and the bonds and certificates hereinafter mentioned and for no other purpose. (As amended, Acts 1891, p. 324. In force March 6, 1891.)

4295. All persons may pay by installments. 1.

4296. Street and sewer bonds—Lien. 8.

4297. Certificates to contractor—Collecting assessments—Foreclosure. 9. It shall be lawful for such city or incorporated town to provide by ordinance for the issuance of certificates or bonds to contractors, who, under contract with the city, shall have constructed any such inprovement in payment therefor, each of which certificates or bonds shall bear the name of the sewer, street or alley improved, the time the same shall run, not to exceed ten years, the rate of interest the same shall bear, not to exceed six per cent. per annum, payable semi-annually, and such certificates and bonds shall transfer to the contractor and his assigns all the right and interest of such city or town to, in and with respect to every such assessment and the lien thereby created against the property of such owners assessed as shall avail themselves of the provisions of this act to have their assessments paid in installments, and shall authorize such contractor and his assigns to receive, sue for and collect, or have collected, every such assessment embraced in any such certificate or

bond, by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act. And, if the city or town shall fail, neglect or refuse to pay said certificates or bonds, or to promptly collect any of such assessments when due, the owner of any of such certificates or bonds may proceed in his own name to collect such assessment and foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such bonds or certificates and the interest thereon, a reasonable attorney's fee, together with the cost of such suit. Any number of holders of such certificates or bonds for any single improvement may join as plaintiffs, and any number of owners of the property on which the same are a lien, may be joined as defendants in such suit. And such bonds and certificates shall be equal liens upon the property for the assessments represented by such bonds or certificates without priority of one over another to the extent of the several assessments against the several lots and parcels of lands.

4298. Precept for sale—Appeal—Sale and conveyance. 10.
4299. Act not to apply to cities of one hundred thousand. 4.

6835

18548.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN,
Plaintiff in Error,

vs.

WILLIAM C. SMITH, JOSEPH H. PATTISON AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE AND JOSEPH H. PATTISON,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR DEFENDANTS IN ERROR.

LAWSON M. HARVEY,
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LINTON A. COX,
SYLVAN W. KAHN,
Of Counsel.

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Defendants in Error.

No. 18548.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

(In Addition to the Statement of the Case in Brief of Plaintiff in Error.)

The complaint in this action is to foreclose an assessment for improvement of a street in the town of Irvington, Indiana.

The complaint alleges that all notices were given defendant (now plaintiff in error), including preliminary notice as to hearing prior to action adopting or rejecting a proposed resolution of necessity for the improvement.

Printed Record, p. 1.

The complaint alleges that hearings were granted and had as to such necessity and a final hearing as to benefits and as to the assessment.

Printed Record, pp. 2 and 3.

There is no denial in the record of the allegations of the complaint as to notice, the answer in denial having been withdrawn. (Printed Record, p. 57.)

It thus appears that plaintiff in error had lawful notice of all the proceedings from the first step to the last.

That plaintiff in error had actual knowledge is shown by the allegation of her fourth paragraph of answer to the effect that, before the adoption of the resolution of necessity, she remonstrated varbally and in writing, "for the reason that the cost of the improvement would be greatly in excess of the benefit thereof."

Printed Record, p. 27.

There is no allegation that she, at any time, iin any manner, objected that the Board of Trustees were incompetent because they were resident taxpayers or that some of the members owned property abutting the proposed improvement.

Plaintiff in error alleges in the third paragraph of her answer (printed record, p. 26) that she commenced an action against the town and asked for a *permanent* injunction preventing the town "from proceeding in any wise with the *continuance* or the *construction* of the *improvement* described," and that this action was, at the time of filing the answer, still pending. "That one of the reasons assigned why such injunction should be gramted was that said improvement would amount to a confiscation off this defendant's property and was wholly void and without warrantt of law."

It will be noticed that she did not assign, as a cause for injunction, the incompetency of the Trustees by reason of their interest.

Plaintiff in error does not allege that she was then or at any time ignorant of the interest of the Trustees.

The petition for injunction was filed April 4, 1898.

Printed Record, p. 2.

This answer was filed February 7, 1900 (printed record, p. 5), almost two years after the suit for injunction was filed, and, though the petition for injunction was still pending, plaintiff in error does not allege that she took any further step toward a hearing She did not ask a temporary restraining order.

BRIEF OF ARGUMENT.

That this statute of Indiana is not unconstitutional has been repeatedly decided in Indiana.

Adams vs. Shelbyville, 154 Ind. 467;
Leeds vs. Defrees, 61 N. E. Rep. 930;
Shank vs. Smith, 61 N. E. Rep. 932;
Martin vs. Willis, 60 N. E. Rep. 1021;
Schaffer vs. Werling, 156 Ind. 704.

The decision last above cited was reviewed upon writ of error by this honorable Court and affirmed.

Schaffer vs. Werling, Adv. Sheets, April 1, 1903, p. 449.

The decision of the State Supreme Court will be followed.

French vs. Barber Asphalt Co., 181 U. S. op. 328;
Gilman vs. Sheboygan, 2 Black. 510;
Whitman Co. vs. Buffalo, 118 Fed. Rep. 773;
Gallup vs. Schmidt, 183 U. S. op. 306-7.

This Court will not again consider a question it has directly and specifically decided.

Swope vs. Lefingwell, 15 Otto 3;
Foster vs. Kansas, 112 U. S. 201.

The procedure of the Trustees cannot render the statute unconstitutional.

Cummings vs. Bank, 101 U. S. 153.

The decision of the State Court rests on a ground of estoppel or waiver of rights which is broad enough to support the decision, hence a Federal question, if raised, will not be considered.

Schaffer vs. Werling, supra;
Gillis vs. Stinchfield, 159 U. S. 658;
Pittsburg, etc., Co. vs. Cleveland, etc,. Co., 178 U. S. 280;
Peirce vs. Somerset Ry. Co., 171 U. S. 641 op. 648.

The decision of the State Court holds that plaintiff in error had a remedy under the laws of the State and failed to invoke the same.

See Printed Record, pp. 63-65;
Smith vs. Shank, 61 N. E. Rep. 932.

In Indiana a remedy by injunction exists to prevent any action by interested Trustees.

Board vs. Justice, 133 Ind. op. 95.

A petition for injunction before action is an adequate and direct remedy. A defense of the character here made after judgment or assessment is a collateral attack.

Jackson vs. Smith, 120 Ind. op. 521;
Johnson vs. State, 116 Ind. op. 375;
Kiphart vs. R. R. Co., 7 Ind. App. 124;
Jackson vs. State, 104 Ind. 516.

The State Court construes such a judgment to be voidable only.

Board vs. Justice, supra.

No Federal question is involved in the construction by the State Court of a State judgment.

Newport Co. vs. Newport, 151 U. S. 527.

The rule that objection to the competency of an officer to pass on a question of a judicial nature must be made at the earliest opportunity or is waived, is a matter of State practice and local law, and as such does not infringe any right under the Federal Constitution.

Dreyer vs. Illinois, U. S. Sup. Court, Advance Sheets, Dec. 15, 1902, p. 28.

This is an established rule of practice in Indiana.

Baldwin vs. Runyon, 8 Ind. App. 348;
Bradley vs. Frankfort, 99 Ind. 417,
(and cases cited therein).

If it be found that the State Court opinion does not cover the matter of alleged incomptency of trustees, then the Court did not decide this question and committed no error.

Schaffer vs. Werling, supra;
Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

The Supreme Court of the United States has held that, under the circumstances shown of record here, an injunction is an adequate remedy and that a constitutional right may be waived by not resorting to a remedy in equity.

Cummings vs. Bank, 101 U. S. 153;
Wight vs. Dwiggins, 181 U. S. 371.

ARGUMENT.

The assignments of error herein question the rulings of the Supreme Court of the State of Indiana as to the validity, under the Constitution of the United States, of a State statute providing for the improvement of town streets, and also the validity of the procedure of the Board of Town Trustees under said statute.

The statute involved is commonly known and designated in Indiana as the Barrett law, being the act of 1889 and amendments thereto in 1891. See Acts of 1889, p. 237, and Acts of 1891, p. 323, said act being designated in the opinion of the State Supreme Court in the case at bar, and in other decisions we shall cite, as Sections 4288-4299, Burns' Revision, 1894.

The points made in brief of plaintiff in error (p. 13) are as follows:

> "The specific objection to the *statute* is that, while it grants "to plaintiff in error a so-called hearing upon the question of "actual special benefits, as it must do to be valid under the rule in "Indiana, it does not provide for such a hearing as will constitute "due process of law, but that it leaves the determination of the "special benefits to an exercise of arbitrary power by the Board "of Town Trustees.
>
> "The specific objections to the *ordinances* and to the *assess-"ments* are:
>
> "(1) That they are made, not according to law, but by an ex-"ercise of arbitrary power (Rec., pp. 24, 28, 46, 50).
>
> "(2) That they are made by Trustees having a direct pecuni-"ary interest in the amount of the assessment antagonistic to the "interest of plaintiff in error (Rec., pp. 26, 28, 47, 51), and
>
> "(3) That the assessment was in substantial excess of the spe-"cial benefit accruing to the property of plaintiff in error (Rec., "pp. 29, 47, 52)."

The third specification of objections to the ordinances and assessments made in brief of plaintiff in error is a statement of a question of fact, to-wit: That the assessment was in substantial excess of special benefit.

This, in so far as it presents this as a fact, is not reviewable as a Federal question.

If it is pertinent here at all, it is covered by the other proposition that plaintiff in error was denied the privilege of showing this to be a fact.

The proposition of plaintiff in error, above stated, that the State law leaves the determination of special benefits to the exercise of arbitrary power, is simply another form of statement that the law is unconstitutional.

The proposition that the assessments were made, not according to law, but by an exercise of arbitrary power, is but another form of the statement that a proper hearing was denied.

Therefore it may be fairly said that the propositions of plaintiff in error are:

1. That the law is unconstitutional, in that it does not afford due process of law.

2. That the plaintiff in error was denied due process by the procedure of the board because:

(*a*) The Trustees denied a hearing.

(*b*) The Trustees were interested.

The statute involved has been held constitutional by the Supreme Court of Indiana.

Adams vs. Shelbyville, 154 Ind. 467;
Leeds vs. De Frees, 61 N. E. Rep. 930;
Shanks vs. Smith, 61 N. E. Rep. 932;
Martin vs. Wills, 60 N. E. Rep. 1021;
Schaffer vs. Werling 156 Ind. 704.

The last decision cited was reviewed by this honorable Court upon writ of error and affirmed.

Schaffer vs. Werling, Advance Sheets April 1, 1903, p. 449.

Therefore, not only is this a closed question because, under the decisions of this Court the holding of the Supreme Court of the State in such a matter will be respected,

French vs. Barber Asphalt Co., 181 U. S. op. 328;
King vs. Portland, 184 U. S. 61;
Gilman vs. Sheboygan, 2 Black. 510;
Whitman Co. vs. Buffalo, 118 F. Rep. 773,

but it is a closed question because this Court has held that it will not again consider a question which it has directly and specifically decided, but will affirm on the authority of its prior decision or will dismiss, though it has jurisdiction to consider and determine.

Swope vs. Lefingwell, 15 Otto. 3;
Foster vs. State of Kansas, 112 U. S. 201.

This leaves nothing for the consideration of this Court unless there be some Federal question growing out of the proceedings of the Town Board under the Barrett law in this particular matter.

The procedure of the Town Board cannot render the Barrett law unconstitutional. See

Cummings vs. Bank, 101 U. S. 153,

wherein it is said:

> "A law cannot be held unconstitutional because, while its just "interpretation is consistent with the Constitution, it is unfaith- "fully administered by those who are charged with its execution. "Their doings may be unlawful, while the statute is valid."

The law cannot be constitutional in one town and unconstitutional in another, or, with reference to the improvement of two

streets in the same town, constitutional when the procedure as to one is of a certain character and unconstitutional when the procedure as to the other is of another character.

If the procedure under the law has denied plaintiff in error due process it must be for other reason than unconstitutionality of the law.

In the matter at bar the procedure under this law is not questioned or involved in the errors assigned except in two particulars.

FIRST—Error of the State Supreme Court in holding that plaintiff in error was not denied due process of law by the alleged refusal of the Town Board to grant her a hearing as to special benefits.

SECOND—Error in holding that the plaintiff in error was not denied due process by the fact that all of the members of the board were taxpayers in the town and two of the members owned property abutting the street improved and liable to assessment therefor.

The State Supreme Court considered and determined the matter involved in both of these assignments of error and based its decision on propositions not involving Federal questions.

If the facts shown of record as to these matters presented a question or ground of decision upon which the ruling of the State Court may rest independent of any Federal question, then this Court will not reverse the decision of the State Court, though a Federal question be also involved.

In

Schaffer vs. Werling, supra,

appellant Schaffer alleged in answer facts tending to show that the town had *denied her a hearing,* and because of this denial she claimed the town was estopped to assert a lien against her property. This Court, in its opinion, said:

"The Circuit Court sustained a demurrer to this answer. It "may be observed that, so far as the question was one of estoppel, "it was purely a State, and not a Federal, question."

The syllabus to

Gillis vs. Stinchfield, 159 U. S. 568,

supported by the opinion, reads thus:

"A judgment of a State Court based upon an estoppel on gen- "eral principles of law and a statute of the State, irrespective of "any Federal question, as an independent ground broad enough "to maintain its judgment, cannot be reviewed in the United "States Supreme Court on writ of error, although a Federal ques- "tion was also decided."

See also

Pittsburg, etc., Co. vs. Cleveland, etc., Co., 178 U. S. op. 280.

In

Pierce vs. Somerset Ry. Co., 171 U. S. 641, op. 648,

we find the following language:

"A person may, by his acts or omission to act, waive a right "which he might otherwise have under the Constitution of the "United States. * * * Whether or not a person has lost a "right under the Federal Constitution by his act or failure to "act is not a Federal question which will sustain a writ of error "to a State Court."

The State Supreme Court held that remedies existed for the alleged wrongs of which plaintiff in error here complains, and that plaintiff in error, by her failure to act, waived those remedies.

Upon the first of the two assignments of error above referred to, to-wit: that the board denied plaintiff in error a hearing, the Court's opinion is as follows (and we may say parenthetically that the principle announced is broad enough to also cover the matter of the claimed incompetency of the board's members.) (Printed record, p. 65.):

"It was the duty of the board to accord appellant, as a prop-
"erty owner affected by the assessment, a hearing as contem-
"plated by the statute, and upon its refusal to do so the law af-
"forded her an adequate remedy for coercing the board to grant
"her such rights. *Shank vs. Smith*," (61 N. E. 932.)

The case of *Shank vs. Smith*, referred to involved the same law and same procedure for the improvement of the same street by the same contractor Smith, who is defendant in error here.

In *Shank vs. Smith* the Court's opinion upon this proposition of waiver is stated as follows (61 N. E. op. 936):

"Assuming that both the committee and the Board of Trustees
"refused to grant appellants a hearing, they should not be per-
"mitted to waive their right to bring *mandamus* to compel a
"hearing, or *injunction* against the approval of the engineer's re-
"port until it had been accorded, and make the denial of a hear-
"ing available as a defense in an action to collect the assessment.
"The right of the board in such cases to consider the engineer's
"report and adjust the assessments to benefits received is a *quasi-*
"judicial power. Here the proper notice was given, the board had
"jurisdiction of the person and subject matter, the power to de-
"cide, and their judgment, thus fair upon its face, cannot be col-
"laterally attacked."

The opinion in the case at bar then proceeds (p. 65):

"The fact that the board may have declined to award her a
"hearing or refused to receive and consider the facts or evidence
"which she offered from the purpose of rebutting the prima facie
"test or standard which the statute provided for the measurement,
"in the first instance, of the benefits to her property, would not
"open the door to a collateral assault on its judgment. The *de-*
"fense which appellant sought to make against the enforcement
"of the assessment, and the *relief* which she sought to obtain un-
"der the facts alleged in the *first, second, third* and *fourth* para-
"graphs of her cross-complaint, were nothing more than a collat-
"eral attack on the judgment of the board."

Thus we find that the decision in terms is that plaintiff in error waived a remedy afforded by the State law for a refusal to grant her a hearing, and the State Supreme Court deemed the remedy specified to be due process of law.

As we have said, the language of the Court is of such scope as to cover the other alleged wrong—the sitting of interested judges.

We submit that the Court intended that its treatment of one should dispose of both, for the Court says further (printed record, p. 66):

> "We have examined and fully considered all the questions dis-
> "cussed by appellant's learned counsel, but discover nothing in
> "the record to justify a reversal."

The State Constitution requires a statement by the Supreme Court, in writing, of each question arising and the decision of the Court thereon (Section 5, Article 7, Constitution of Ind.), and we must presume that the Court discharged this obligation fully and that the paragraphs of opinion we have quoted were intended to dispose of all questions within the principle announced.

The Court thus also held that a remedy existed whereby plaintiff in error could have enjoined the board, if members were incompetent, from taking *any step* toward an improvement of this particular street, which would result in an assessment by a board of trustees, some members of which owned property abutting the street, and that plaintiff in error waived her right to this remedy.

The only alleged interest which is worthy of consideration here is that Trustees own property abutting the street.

That interest as taxpayers is not such an interest as will render the members of the board incompetent is shown by authorities cited in the brief of plaintiff in error. Furthermore it is a matter of State policy to require that such boards be composed of resident taxpayers. See

State vs. Crane, 36 N. J. L. 394;
City of Minneapolis vs. Wilkin, 30 Minn. 140;
Bass vs. Ft. Wayne, 121 Ind. op. 391.

That the State Supreme Court intended its opinion to be understood as holding that plaintiff in error had a remedy by injunction, and waived it, is made apparent by the fact that the Court in former decisions had at length treated of this question, and had decided that, though a statute, in a special proceeding, did not provide for an appeal from the judgment of interested officers, a remedy by injunction existed which, if invoked promptly, would prevent the matter proceeding *to judgment* or *to an assessment*, and that this remedy was waived by failure to act.

Board vs. Justice, 133 Ind. op. 95.

Furthermore the opinion in *Board vs. Justice, supra*, shows that the Supreme Court of Indiana construes a judgment rendered under such circumstances as are apparent of record here to be a voidable, and not a void, judgment.

Hence the rule applies which was announced by this Court in

Newport Co. vs. Newport, 151 U. S. 527.

that no Federal question is involved in the construction placed upon the judgment of an inferior court by the Supreme Court of a State.

The Supreme Court, in the case at bar, holds that the judgment of the Town Trustees is not void and cannot be attacked collaterally, as is attempted by plaintiff in error.

Judging by the vast number of authorities cited by counsel for plaintiff in error to the proposition that no man may be a judge in his own case, and the greater number of authorities cited showing that judgments rendered by an interested judge or officer have been set aside, one might conclude that no court in Indiana, from the tribunal composed of own Trustees to the Supreme Court, had ever heard of this rule, or, if the idea had been suggested, it had been brushed aside as unworthy of consideration.

While the courts of Indiana need no defense at our hands, we may be pardoned for saying that no court in the Union has more fully recognized the doctrine that no man may be a judge in his own case, nor has any court more vigorously enforced this doctrine by setting aside judgments, upon proper application, when rendered by interested officers.

The courts of Indiana have, however, never allowed a party, "having notice and knowledge," to reserve his objection to the action of an interested officer until such time as others, depending thereon, have expended vast sums of money to his benefit, and have advanced to such a position that irreparable loss will result if the objection be later made and heeded.

The views of the Supreme Court of Indiana are shown by its opinion in *Board vs. Justice, supra*, op. 93, and we here quote this opinion at some length, for the reason that it treats of the matter in a comprehensive manner and in effect distinguishes many of the decisions cited by plaintiff in error, and for the further reason that it holds that, as the party complaining had a direct remedy by appeal, he could not subject the judgment to collateral attack by injunction, but if no direct remedy existed in the proceeding itself he might have enjoined if he had acted in time. We quote as follows:

> "The maxim that no man should be a judge in his own case is "so well established, both in reason and by authority, that it needs "neither argument nor the citation of adjudged cases in its sup- "port. The *effect to be given an adjudication rendered by a dis- "qualified tribunal is another* and a more troublesome question.
>
> "A judgment rendered by a court where the judge is disquali- "fied must necessarily be either void or voidable. If void, it may "be disregarded and treated as if it had never been rendered. It "would be no protection to officers acting under it. If, on the "contrary, such a judgment is not void, but merely voidable, it "will protect persons lawfully acting under it, and will be given "full force and effect as a valid and subsisting judgment until "reversed or set aside on appeal, or other appropriate method "of direct attack.

"The decided weight of authority seems to establish the propo-
"sition that at common law the acts of a disqualified judge are
"not mere nullities; they are liable to be avoided or reversed on
"proper application, but cannot be impeached collaterally. *Dimes*
"*vs. Grand Junction Canal,* 3 H. L. Cas. 759 (785); *State vs.*
"*Moses,* 36 N. J. L. 394; "*Fowler vs. Brooks,* 64 N. H. 423, S. C.
"13 Atl. Rep. 417; *Trawick vs Trawick's Admrs.,* 67 Ala. 271;
"*Moses vs. Julian,* 45 N. H. 52; *Rogers vs. Felker,* 77 Ga. 46;
"*Hine vs. Hussey,* 45 Ala. 496 (513); 1 Black on Judgments,
"Section 174; Freeman on Judgments, Section 145; Wells on
"Jurisdiction, Section 172.

"In many of the cases cited as sustaining the proposition that
"judgments rendered by a disqualified tribunal are void it will
"be found, upon examination, that the judgments so rendered
"were attacked on appeal, and the language must be construed
"as applicable to the case before the court. *Peninsular R. W. Co.*
"*vs. Howard,* 20 Mich. 18; *Gregory vs. Cleveland, etc., R. R. Co.,*
"4 Ohio St. 675. In many States statutes have been passed which
"prohibit judges disqualified by interest or relationship from act-
"ing in certain cases. Under these statutes it has usually been
"held that judgments rendered in contravention of statute are
"not simply voidable, but void. Black on Judgments, Section
"174, and cases cited; *Templeton vs. Giddings,* 12 S. W. Rep.
"(Tex.) 851; *Frevert vs. Swift,* 19 Nev. 363.

"We do not hold that a case might not arise where a judgment
"rendered by a sole judge might not be absolutely void; such, for
"instance, as one granting himself a divorce from his wife.

"While it has been held that if incompetent magistrates or
"judges composing a court sat at the hearing, a judgment ren-
"dered by the Court should be quashed or set aside (*Peninsular*
"*R. W. Co. vs. Howard, supra; Queen vs. Justices, etc.,* 6 Q. B.
"753), we are of the opinion that in an action brought to declare
"such judgment a nullity the fact that the major portion of the
"members of the court were disinterested is not without weight;
" and, also, the fact that a large number of parties litigant, other
"than such disqualified judge, were interested in and would be
"affected by such judgment.

"It will be presumed in a collateral attack, such as this, and
"especially in the absence of an averment to the contrary, that
"the County Auditor gave the notice required by Section 5092,
"R. S. 1881, of the time and place of meeting of the viewers
"(*White vs. Fleming,* 114 Ind. 560), and it appears from an ex-
"exhibit of the complaint that the notice required by Section

"5096, R. S. 1881, was given. This gave the appellees, and all "other land owners interested, an opportunity to appeal to the "Circuit Court, in which the proceedings taken before the Board "of Commissioners might have been reviewed before a duly con- "stituted and impartial tribunal. *White vs. Fleming, supra; "Markley vs. Rudy,* 115 Ind. 533; *Fleming vs. Hight,* 101 Ind. "466; *Wilkinson vs. Lemasters,* 122 Ind. 82; *Board, etc., vs. Ful- "len,* 118 Ind. 158.

"If no provision had been made in the statute *for notice* to "the land owners affected, at some stage of the proceedings, or "*opportunity given by appeal* of having their causes tried by a "duly constituted and impartial tribunal, the remedy by injunc- "tion would doubtless be open to the appellees. *McEneney vs. "Town of Sullivan, supra; Bass vs. City of Ft. Wayne,* 121 Ind. "389; *Updegraff vs. Palmer,* 107 Ind. 181; *Forsythe vs. Kreuter,* "100 Ind. 27. In *Osborn vs. Sutton, supra,* it was held that an "objection to the competency of an assessment committee must be "made at the time the committee is appointed, or within a rea- "sonable time thereafter.

"In *Bradley vs. City of Frankfort,* 99 Ind. 417, a commissioner " to assess damages to property affected by the opening of a street " was related to one who was financially interested in having it "opened. It was held that one served with notice of the meeting "of the commissioners before the assessment against his prop- "erty, and of the incompetency of the commissioner, must then "and there make the objection, or it will be deemed waived.

"The general rule to be deduced from these and similar cases "is that where the Board of County Commissioners has *jurisdic- "tion* of the *subject matter,* and has *acquired jurisdiction* of the "*person* by giving the required notice and an *opportunity by ap- "peal* is given of having a trial by an impartial tribunal, the pro- "ceedings are not subject to a collateral attack by injunction or "otherwise."

We have no quarrel with decisions cited by plaintiff in error to the effect that taxpayers are not competent jurors and that their verdicts will be set aside.

The same authorities hold that if a party have knowledge of the disqualification or fail to exercise his right of examination before accepting the jury, he may not thus chance a verdict in his favor and object if it be adverse.

Nor do we question such decisions as *Campbell vs. Dwiggins,* 83 Ind. 473, cited by plaintiff in error.

There an officer was empowered by legislative act to determine that a ditch needed repair, to do the work and to report his assessment therefor to the County Auditor, who in turn caused it to be entered on the tax duplicate and *all this without any notice* to or hearing of the parties assessed. The lack of notice and opportunity for hearing was deemed of such controlling weight that the Court did not consider the allegation that the officer making the assessment owned property assessed, but the Court held the law unconstitutional and enjoined enforcement of the assessment.

Nor is the decision in *Chicago Ry. Co. vs. Summers,* 113 Ind. 10, cited by plaintiff in error, contrary to our position. There the attorney who filed complaint upon which judgment was rendered was also a justice of the peace.

He procured a change of venue to his own court, and still acting as plaintiff's attorney, rendered judgment for his client *over objection* by defendant to his acting as judge. He could not take jurisdiction. He was a usurper. The defendant harmed no one by waiting, after prompt objection, until it was sought to enforce the judgment. The defendant waived nothing.

This decision shows great respect on the part of the Supreme Court of the State of Indiana for the rule that no man may be a judge in his own case.

We need not consume this Court's time by reviewing the many decisions cited by plaintiff in error. In so far as they are, by counsel, treated of in detail they are easily classified and it is observed that almost without exception the judgments were set aside on appeal, or by some direct method known to the procedure of the State wherein rendered.

Many of the decisions cited show remedies available if sought in time.

6845

The decision in *Chicago Ry. Co. vs. Summers,* 113 Ind. 10, is distinguished in

Baldwin vs. Runyan, 8 Ind. App., *op.* 348,

and in the latter case it is held that—

"If the appellant in the present case was aware of the alleged "disqualification of the justice at the time he tried the cause, it "was his imperative duty to make it known and object to his "acting as judge in such trial. He could not be permitted to sit "quietly by and await the result of the trial and then in the event "of an adverse decision raise an objection to the judge after the "rendition of judgment."

That such incompetency is waived by failure to object see, also,

Osborn vs. Sutton, 108 Ind. 443;
Harbaugh vs. Albertson, 102 Ind. 64.

We might cite many more such decisions, but these suffice to show that this is a settled matter of practice and local procedure in Indiana, and being such it infringes no right secured by the United States Constitution.

Dreyer vs. Illinois, U. S. Sup. Crt. Adv., Sheets' Dec. 15th, 1902, p. 28.

If it be found, however, that the State Court's opinion does not cover this matter of remedy for the alleged incompetency of the members, then it follows the Court did not decide this question and has not committed the error assigned.

Schaffer vs. Werling, U. S. Sup. Crt., Jan. 27, 1903;
Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

Grant, however, that the State Supreme Court did not base its decision, as to the incompetency of the trustees, upon an estoppel or a waiver, but decided in general terms that the laws of Indiana afforded due process of law in this particular, then we submit—

First—That the decision of a State Court placing a construction upon the State statutes and laws to the effect that they provide due process will be respected by the Supreme Court of the United States.

King vs. Portland, 184 U. S. 61;
Gilman vs. Sheboygan, 2 Black. 510;
Gallup vs. Schmidt, 183 U. S., *op.* 306-7.

Second—We submit that the State Supreme Court was not in error as to the existence of a remedy.

While it is true that the statute does not provide for an appeal from the decision fixing the assessment, nor for a change of venue from interested trustees, if there are such, or any similar remedy in the particular proceedings, yet we submit to your Honors that there existed, independent of the street improvement law, an effective remedy by way of injunction against action by the board, and to this proposition that an injunction is a proper and adequate remedy we cite again the opinion of this Court in

Cummings vs. Bank, 101 U. S. 153,

wherein it is held that as against an unequal tax a court of equity may restrain the operation of an unconstitutional exercise of power and do so independently of any statute expressly provided for such injunction.

We copy a quotation made in brief of plaintiff in error from *Wight vs. Dwiggins,* 181 U. S. 371:

"Special facts showing an abuse or disregard of the law, result-
"ing in actual deprivation of property may give grounds for ap-
"plying for relief to a court of equity."

And we add another quotation from the same decision:

"The constitutional right against unjust taxation is given for
"the protection of private property and may be waived by those

"affected who consent to such action to their property as would "otherwise be invalid."

"Under some circumstances a party, who is illegally assessed, "may be held to have waived all right to a remedy, by a course of "conduct which renders it unjust and inequitable to others that he "should be allowed to complain of the illegality. * * * Some "of the cases go far in the direction of holding that a mere fail- "ure to give notice of objections to one, who, with the knowledge "of the person taxed, as contractor or otherwise, is expending "money in reliance upon payment from the taxes may have the "same effect."

Third—We submit that, as this remedy by injunction existed, plaintiff in error cannot successfully claim that she was denied due process of law unless she shows that she sought to invoke this remedy by injunction and that she was denied the right.

The record does not disclose that appellant at any time, in any manner, raised any question *as to the competency* of the members until long after all proceedings of the board were ended, the street improvement completed and this action commenced for the foreclosure of the assessment lien.

It is true that the answer of plaintiff in error shows (printed record, p. 26) that she instituted an action for an injunction against the letting of the contract because of anticipated excessive cost, but it is not alleged that she therein made any suggestion as to the competency of the members of the board nor that she prosecuted that suit to effect or to defeat.

The mere beginning of a suit does not relieve a party from the charge of laches if he fails to duly prosecute the same.

Johnson vs. Standard Mining Co., 148 U. S. 360;
Planet Co. vs. St. Louis Ry. Co., 115 Mo. 613.

The first appearance of this fact in the record is in the answer of plaintiff in error to the complaint herein to foreclose, and she does not allege ignorance during the time she might have petitioned for

an injunction, nor does she allege that the trustees who made the final assessment were not in office during all the proceedings.

So it is clear that the remedy existed and that plaintiff in error did not seek to use the remedy and was not denied its benefit.

We make these suggestions not for the purpose of arguing here a question of estoppel or waiver, but for the purpose of showing that appellant was not denied due process. She did not avail herself of due process provided.

It is appropriate to here observe that it is no answer, under the circumstances in this case, to say that a new assessment may be made, by some succeeding board of trustees, none of the members of which own property on this street, because this objection is not one which affects the matter only at the time of fixing the assessment and no earlier, nor is it an objection which affects only some irregularity which may be corrected on a re-assessment, but the objection, if now available, reaches the root of the board's action and renders void the original declaration or resolution of necessity for an improvement of the street and the holding of the board that it should be a brick street, of a certain width and with certain curbs.

If the contractor were now put to the necessity of having the matter reconsidered from the start, the board now in power would of necessity pass on all these preliminary questions and would have power to decide that no improvement was needed, or that the pavement should be asphalt and no court could require any different decision.

In this connection we desire to call the attention of your Honors to a paragraph of the opinion in the case at bar for the purpose, first, of illustrating the kind of situation which justifies a reassessment without danger to substantial rights of any party and for the purpose, second, of explaining that this portion of the opinion does not hold or intimate that this assessment should be remade by another board.

An assessment was made in this proceeding against certain unplatted land of plaintiff in error. The description used in the assessment roll was too indefinite to identify, or furnish means for identifying, the land intended. (Printed record, p. 4, last item in Exhibit A.) This lack of description was the basis of the fifth paragraph of answer in suit to foreclose (Printed record, p 31) and of the cross-complaint to quiet title (Printed record, p. 53) and the Supreme Court in treating of the question whether the contractor had a *lien* which might be perfected on a reassessment by a proper description says (Printed record, p. 65):

"When Sections 3 and 7 of the Barrett law (Sections 4290, "4294, Burns' Ann. St., 1894) are construed in connection with "each other, it is manifest that the assessment levied by a board "of trustees or by a common council of a city, as the case may be, "for the improvements authorized by the statute, together with "the interest accruing after such assessment is made, becomes a "lien, to the extent of a tax lien, from the time or date at which "the improvement or work was ordered. The power and duty "of the board of trustees or common council, as the case may be, "under the statute, to make an assessment for such improvements, "*continue* in that tribunal until legally exercised. While it is "true that a void *assessment* may be defeated or set aside and held "for naught in a collateral action, still, under such circumstances, "if the *principal* proceedings of the board upon which an assess-"ment must rest *are not also void*, a valid reassessment may be "made, by which the objectionable matters or grounds which re-"sulted in rendering the first assessment invalid, may be avoided. "Consequently, while an invalid assessment may be set aside, or "its enforcement defeated, still the Court, under its judgment, in "so doing, would not be authorized thereby to impose or destroy "the lien arising out of a subsequent reassessment; and such lien, "as previously stated, would attach to the property as of the date "when the improvement in question was ordered to be made. "*Balfe vs. Johnson*, 40 Ind. 235; *Ball vs. Balfe*, 41 Ind. 221; "*Reeves vs. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Sands vs.* "*Hatfield*, 7 Ind. App. 357, 34 N. E. 654; *Becker vs. Railway* "*Co.*, 17 Ind. App. 324, 46 N. E. 685; Wats. St. Liens, Section "1224."

It is easily seen that at this late date the contractor has no assured remedy and the inequity of allowing plaintiff in error to now defeat the contractor when she might have enjoined the board before he did his work is apparent.

Defendant in error Joseph H. Pattison, William F. Churchman and The Financial Exchange were made parties defendant in the action below to answer as to any interest they might have in the assessments.

No question is involved in their demurrers to the answers and cross-complaint that is not involved in the demurrers of defendant in error Smith.

For them we may be permitted to say there is no error.

We respectfully submit, That the statute in question is constitutional.

That there is no other Federal question alone presented, but rather a question whether plaintiff in error waived a remedy which the laws and decisions of Indiana afforded and that therefore the decision of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

LAWSON M. HARVEY,

Counsel for Defendants in Error.

Of Counsel—

WILLIAM A. PICKENS,

LINTON A. COX,

SYLVAN W. KAHN.

6848

Supreme Court of the United States.

No. 59.—October Term, 1903.

Sarah A. Hibben, Plaintiff in Error, vs. William C. Smith et al. } In error to the Supreme Court of the State of Indiana.

[November 30, 1903.]

The plaintiff in error seeks by this writ to review the judgment of the Supreme Court of the State of Indiana, affirming a judgment in favor of one of the defendants in error, William C. Smith, foreclosing the lien of an assessment levied upon certain real estate in the town of Irvington, belonging to the plaintiff in error. The plaintiff Smith brought this action to foreclose the lien, and alleged in his complaint that he was the contractor for the doing of the work for a local improvement on Washington street in the town mentioned, and had complied with all the provisions of the statute and with his contract, and had finished the work and was entitled to payment for the same; that an assessment to provide for such payment had been duly imposed by the board of town trustees, upon the property abutting on the portion of the street where the improvement was made, and that the defendant Sarah A. Hibben was the owner of lots abutting on that improved portion of the street, and her assessment amounted to over five thousand dollars, which she had not paid; that the assessment was then due with six per centum interest, and the plaintiff prayed that the lien might be foreclosed against her property, and that it might be sold for the satisfaction of the assessment, and for other proper relief in the premises.

The defendant Hibben demurred to the complaint, and the same having been overruled, she filed an answer thereto. She also filed a cross complaint. The answer and cross complaint set up the same facts in substance and they both averred the unconstitutionality of the act of the legislature of Indiana providing for the improvement of streets under which the improvement in question was made, and also it was objected to the validity of the assessment that the alleged improvement was of no benefit to many of her lots, and that, on the contrary, the assessment upon such lots was greater than their value, and resulted in a substantial confiscation of her property in those lots; also that the assessment had been made by the front foot and without reference to the benefits received from the improvement, and that no hearing before the board of trustees was had and no consideration given to the question of whether or not the abutting property or any part thereof was specially benefited in an amount equal to, less

than or in excess of the amounts fixed by the assessments which were confirmed by such board, but on the contrary that the assessments were made and confirmed upon the theory and belief that the statutes of the State established the rule of assessment at the same fixed price per lineal front foot on each side for the whole improvement, and that no change could be made therein by the board of trustees, and that the board refused at such hearings to hear or consider any objection to the assessment based upon any inquiry into the amount of special benefit accruing to any abutting lot or parcel of land.

It was also averred in the answer and in the cross complaint that all the members of the board of trustees of the town of Irvington were residents of that town and taxpayers therein, and that two members of the board were owners of lots abutting upon said improvement and assessed therefor at the same rate per lineal front foot as the others, and it was averred that no assessment could legally be levied by such a board of trustees, and the assessment was for that reason wholly void.

These defenses contained in the answer and which were also set up in the cross complaint, were severally demurred to by the complainant Smith, and the demurrers sustained, and upon the refusal of the defendant Hibben to amend, judgment enforcing the lien was entered, which, upon appeal to the Supreme Court of Indiana, was affirmed.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The Supreme Court of the State of Indiana has held the statute to be constitutional under which this lien was established and judgment entered for its foreclosure. That court has held that under the State constitution an assessment arbitrarily by the front foot is unconstitutional, but that the statute in question provides only a rule of *prima facie* assessment by the front foot, and that such assessments are subject to review and alteration by the common council or board of trustees upon the basis of special benefits received from the improvement, and the common council and board of trustees not only have the power, but it is their imperative duty to adjust an assessment to conform to the actual special benefits accruing to each of the abutting property owners. (*Adams* v. *City of Shelbyville*, 154 Ind. 467; *Schaefer* v. *Werling*, 156 Id. 704; *Martin* v. *Wills*, 60 N. E. Rep. 102; *Leeds* v. *De Frees*, 61 Id. 930; *Shank* v. *Smith*, 61 Id. 932.)

Shaefer v. *Werling*, *supra*, has been affirmed upon writ of error by this court, (188 U. S. 516,) where it was held that the statute in question was not in conflict with the Constitution of the United States, and the principle was reiterated in that case that the construction placed by the highest court of a State upon a statute providing for paving the streets and distributing the assessment therefor was conclusive upon this court.

See also *Merchants & Manufacturers' Bank* v. *Pennsylvania*, (167 U. S. 461.)

The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a Federal nature arises therefrom.

If the board of trustees refuse to hear the owners of property abutting the street improvement, in regard to the subject of benefits, and arbitrarily proceed to levy the assessment solely according to the front foot, the Supreme Court of Indiana has held that such lot owner was not without remedy, and that he could by mandamus or injunction compel a hearing as to the amount of the assessment upon each lot, or prevent the approval of the engineer's report until such hearing had been accorded, and that the lot owner could not waive such a remedy and make the denial of a hearing available as a defense in an action to collect the assessment. (*Shank* v. *Smith*, *supra*.) Under the cases above cited this court follows the decision of the Supreme Court of Indiana upon this question of remedy. The claim set up on the part of the lot owner, that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and a hearing by a court, is not tenable. Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such assessments the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a State may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

In *Fallbrook Irrigation District* v. *Bradley*, (164 U. S. 112, 168,) it was said that—

"Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one provided by the statute."

And it was also said in that case that whether a review is or is not given upon any of these questions of fact, (that is, as to benefits and the amounts of the assessments,) was a mere question of legislative discretion, so long as the tribunal created by the State had power to decide them, and the

opportunity for a hearing was given by the act, and that it was not constitutionally necessary in such case to give a rehearing or an appeal.

In *Spring Valley Waterworks* v. *Schottler*, (110 U. S. 347,) where the law provided for the fixing of water rates by a board of supervisors after a hearing, and without any right of review by any court, it was stated (at page 354) by Mr. Chief Justice Waite, giving the opinion of the court:

"Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." See *Spencer* v. *Merchant*, (125 U. S. 345.)

The sole remaining question arises upon the allegations contained in the answer and cross complaint, that all the members of the board of trustees were residents of the town and taxpayers therein, and that two members of the board were owners of lots abutting upon the improvement, and assessed therefor at the same rate as the others.

The objection to the tribunal constituted by the legislature of Indiana, which the plaintiff in error makes in this particular instance, is that it results in making a person a judge in his own case, and that hence any judgment of a tribunal thus constituted is absolutely void, and may be attacked, as it is attacked in this case, collaterally. It is said that to impose an assessment, which is the same as a judgment under such circumstances is to take the lot owner's property without due process of law, and violates thereby the Federal Constitution. We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. We have not the slightest doubt of the power of a legislature of a State, unless hampered by some special constitutional provision, to create a tribunal in a city or town, such as the common council or board of trustees, to make an assessment, and that such assessment would be valid, notwithstanding the fact that every member of the board was a taxpayer of the city or the town. It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the States to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. It is not at all analogous, even in principle, to a judge of a court acting in a case in which he was personally interested.

To say that no one who was a taxpayer in a city or town could act in imposing an assessment upon property therein is to say that the legislature is wholly without power, by reason of the Federal Constitution, to constitute a tribunal to make an assessment where such tribunal is composed

of taxpayers in the city or town. This we do not believe. It must frequently happen that a board of assessors for a city, to assess all property for general taxation, will be composed of men who themselves own property in the city and assess the same for purposes of such taxation. Can there be any doubt of the validity of the general assessments under such circumstances? And would not the assessment for taxation of the property of the individual members of the board of assessors, made by the board, be valid if authorized by the statute? See *Brown* v. *Massachusetts*, 144 U. S. 573, (citing 147 Mass. 585, 591; 150 Id. 334, 343.)

Then as to the averment that there were two members of the board who were owners of lots abutting upon the improvement and were assessed therefor at the same rate as other lot owners. Although it might have been more seemly for those two members, if they recollected the fact of such ownership, to have refused to act in the matter, yet there is nothing to show that their attention was called to the fact, nor does it appear that any objection was made by plaintiff in error or any one else to their acting, nor that the plaintiff in error was ignorant of their interest at the time when the proceedings were commenced. The State court has held that an assessment for improvements under this statute of Indiana is in the nature of a judgment, and the fact that members of the board who levied the assessment owned property, as stated, would not render the judgment void, but at most, voidable, and that it could not be attacked collaterally. The cases of *Bradley* v. *City of Frankfort*, (99 Ind. 417;) *Jackson* v. *Smith*, (120 Id. 520,) and *Board of Commissioners* v. *Justice et al.*, (133 Id. 89,) are referred to.

Whether a judgment obtained in a case like this, where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment, is a proper question for the State court to decide. A State court has the right to place its own construction upon its own judgments, and where, as in a case like this, it holds that the judgment is not void and that it cannot be attacked collaterally, we ought to follow that determination. (*Newport Light Company* v. *Newport*, 151 U. S. 527, 539.)

In *Lent* v. *Tillson*, (140 U. S. 316,) which was an assessment case, it was stated by Mr. Justice Harlan, in delivering the opinion of the court, (p. 333,) as follows:

"Other objections have been urged by the plaintiffs which we do not deem it necessary to consider. For instance, it is said that the mayor of the city of San Francisco, one of the board of commissioners, was himself the owner of a lot on Dupont street, and, for that reason, was incompetent to act as one of the board of street commissioners. . . . In respect to

all these and like objections, it is sufficient to say that they do not necessarily involve any question of a Federal nature, and so far as this court is concerned, are concluded by the decision of the Supreme Court of California."

The provisions of the Fourteenth Amendment do not cover such an objection as is now under consideration. The general system of procedure for the levying and collection of taxes which is established in this country is, within the meaning of the Constitution, due process of law. (*Kelly* v. *Pittsburgh*, 104 U. S. 78.) A provision made by the legislature of a State in relation to the manner of levying an assessment for a local improvement is within this principle a proceeding for the levying and collection of taxes, and unless it be in violation of some particular provision of the Federal Constitution, it will be upheld in this court. The Fourteenth Amendment, it has been held, legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary State legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress; but that the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and that the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights, such as existed in the case of *Norwood* v. *Baker*, (172 U. S. 269.)

These principles have been reiterated in a series of cases reported in 181 U. S., commencing with *French* v. *Barber Asphalt Paving Company*, at page 324 of that volume.

The facts contained in the objection now under discussion do not, in our judgment, constitute any violation of the Federal Constitution or result in the taking of the property of the plaintiff in error without due process of law, as that term is understood, when used in the Constitution of the United States. We see no error in the record in this case which we can review, and the judgment of the Supreme Court of Indiana is

Affirmed.

Mr. Justice WHITE concurred in the result.

True copy.

Test:

Clerk Supreme Court, U. S.